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Affirming the Law of Nations in U.S. Courts: The Karadzic Litigation and the Yugoslav Conflict

By
William Aceves†

International law in the modern era has traditionally focused on the rights and obligations of states.¹ Indeed, positivist legal theory viewed international law as solely regulating the behavior of states, and individuals were not subject to this law.² The nature of international law underwent a fundamental transfor-

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1. Jeremy Bentham coined the term "international law" in 1789 to replace the term "law of nations." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 6 (Burns and Hart, eds. 1970). While Bentham indicated that he was merely providing a new label to an old term, his subsequent description of the scope of international law suggests otherwise. See MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 227-235 (2nd ed. 1993). According to Janis, Bentham "assumed that international law was exclusively about the rights and obligations of states *inter se* and never about the rights and obligations of individuals." *Id.* at 230-231. However, this interpretation of international law was contrary to the earlier view of the law of nations which defined itself as "that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each." WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 66 (1st ed. 1765-1769).

2. See, e.g., J.L. BRIERLY, THE LAW OF NATIONS 1 (6th ed. 1963); LASSA OPPENHEIM, 1 INTERNATIONAL LAW 636, 639 (8th ed. 1955). According to Philip Jessup, the primacy of states in international law occurs because "the world is today organized on the basis of the co-existence of States, and that fundamental changes will take place only through State action, whether affirmative or negative." PHILIP JESSUP, A MODERN LAW OF NATIONS 17 (1948). Similarly, Michael Akehurst noted that "[i]n the nineteenth century states were the only legal persons in international law; international law regarded individuals in much the same way as municipal law regards animals." MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 70 (1987). In contrast, some commentators have stated that international law traditionally recognized individuals. For example, Ian Brownlie suggests that "[s]ince the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals." IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 561 (4th ed. 1990). Similarly, Edwin Dickinson indicated that "[t]he Law of Nations in the eighteenth century embraced a good deal more than the body of practice and agreement which came later to be called public international law. . . . The universal law was law for individuals, no less than for states. As such, it was concerned somewhat indiscriminately with matters between individuals, between individuals and states, and between states." Edwin Dickinson,

mation following the Second World War. The atrocities committed during the war led to the transformation of international humanitarian law and the recognition of the rights and obligations of individuals. The Nuremberg trials definitively established that individuals could be held accountable for violations of international law.³ As the Nuremberg War Crimes Tribunal noted “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”⁴ As a result, numerous international agreements now codify the respective rights and obligations of individuals.⁵

Despite international recognition of the rights and obligations of individuals, U.S. courts have been reluctant to extend this development to American jurisprudence. Recognizing the rights and obligations of individuals would also establish a concomitant obligation on the government to protect these rights and enforce these obligations. In the United States, extensive recognition of rights and obligations of individuals poses a unique problem because of the Alien Tort Claims Act (“ATCA”), which provides that “[t]he district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁶

The Alien Tort Claims Act was enacted as part of the Judiciary Act of 1789.⁷ It remained relatively unused,⁸ however, for almost 200 years until the Second Circuit examined its application in *Filartiga v. Pena-Irala*.⁹ In the *Filartiga* case, the Second Circuit held that the Alien Tort Claims Act provides federal court jurisdiction “whenever an alleged torturer is found and served with process by an alien within our borders.”¹⁰ Since then, the ATCA has been used increasingly by victims of human rights abuses. Courts have generally recog-

The Law of Nations as Part of the National Law of the United States, 101 U. PA. L. REV. 26, 27 (1952).

3. See generally, TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992); Telford Taylor, *Nuremberg Trials: War Crimes and International Law*, 450 INT’L CONCILIATION 303 (1949); UNITED NATIONS WAR CRIMES COMMISSION, *HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR* (1948).

4. Judgment of the International Military Tribunal at Nuremberg, 6 F.R.D. 69, 110 (1946).

5. See e.g., United Nations Charter, 59 Stat. 1031, T.S. No. 993; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR 3rd Sess., at 71, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, opened for signature Dec. 19, 1966, entered into force March 23, 1976, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 19, 1966, entered into force Jan. 3, 1976, 993 U.N.T.S. 3.

6. 28 U.S.C. § 1350 (1988).

7. Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 77 (1789) (codified at 28 U.S.C. § 1350 (1982)). The legislative history of the Alien Tort Claims Act is relatively obscure. It has been referred to as “a kind of legal Lohengrin . . . no one seems to know whence it came.” *ITT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2nd Cir. 1975). See generally, Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789*, 67 ST. JOHN’S L. REV. 491 (1993); Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461 (1989); David Cole, Jules Lobel and Harold Koh, *Interpreting the Alien Tort Statute*, 12 HASTINGS INT’L & COMP. L. REV. 1 (1988).

8. Prior to 1980, U.S. district courts heard only 21 lawsuits arising under the Alien Tort Claims Act. Kenneth Randall, *Federal Jurisdiction Over International Law Claims: Inquiries Into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT’L L. & POL. 1, 4-5 (1985).

9. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980).

10. *Id.* at 877

nized the application of the Alien Tort Claims Act to state actors that violate international law. It was unclear, however, whether the ATCA applied to non-state actors who violate international law. In a recent case, the Second Circuit examined the application of the Alien Tort Claims Act with respect to human rights violations committed by private individuals during the Yugoslav conflict.

In *Doe v. Karadzic*,¹¹ Bosnian refugees brought two separate actions in a U.S. district court against Radovan Karadzic, the leader of the Bosnian Serbs, for human rights violations committed by forces under his command and control in the former Yugoslav republic of Bosnia-Herzegovina.¹² Karadzic was charged with several egregious human rights violations including genocide, war crimes and crimes against humanity.¹³ Jurisdiction was based primarily on the Alien Tort Claims Act.¹⁴ In a controversial ruling, the district court dismissed both actions for lack of subject-matter jurisdiction.¹⁵ The district court held that acts committed by non-state actors do not violate the law of nations. In *Kadic v. Karadzic*, the Court of Appeals for the Second Circuit reversed the lower court ruling, holding that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."¹⁶

The *Karadzic* litigation is significant because it examines several issues concerning international law and its application in the United States.¹⁷ Can non-state actors violate international law? Do genocide, war crimes, torture and summary execution require state conduct to be considered violations of international law? Does the Alien Tort Claims Act apply to the actions of non-state actors who violate international law? On a more fundamental level, the *Karadzic* litigation is significant because it upholds the status of the Alien Tort

11. *Doe v. Karadzic* 866 F. Supp. 734 (S.D.N.Y. 1994).

12. *Id.* at 736.

13. *Id.* at 735-737.

14. *Id.*

15. *Id.* at 744.

16. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2nd Cir. 1995).

17. Several articles have examined the early litigation in *Doe v. Karadzic*. See Michele Brandt, *Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute*, 79 MINN. L. REV. 1413 (1995); Yolanda Wu, *Genocidal Rape in Bosnia: Redress in U.S. Courts Under the Alien Tort Claims Act*, 4 UCLA WOMEN'S L. J. 101 (1993). In addition, several publications have examined the broader issue of mass rape in the former Yugoslavia. See Elizabeth Kohn, *Rape as a Weapon of War: Women's Human Rights During the Dissolution of Yugoslavia*, 24 GOLDEN GATE U.L. REV. 199 (1994); THE ENTRENCHMENT OF SYSTEMATIC ABUSE: MASS RAPE IN FORMER YUGOSLAVIA (Alexandra Stiglmayer ed., 1994); Krishna Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOK. L. REV. 929 (1994).

The implications of the Yugoslav crisis have also been discussed in the legal literature. See Gideon Moor, *The Republic of Bosnia-Herzegovina and Article 51*, 18 FORDHAM INT'L L.J. 1084 (1995); Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. INT'L L. 783 (1995); Jordan Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INT'L L. & POL'Y 499 (1994); Christian Garris, *Bosnia and the Limits of International Law*, 34 SANTA CLARA L. REV. 1039 (1994); David Kresock, *Ethnic Cleansing in the Balkans: The Legal Foundations of Foreign Intervention*, 27 CORNELL INT'L L.J. 203 (1994); Richard Iglar, *The Constitutional Crisis in Yugoslavia and the International Law of Self-Determination*, 15 B.C. INT'L & COMP. L. REV. 213 (1992); Charles Lewis Nier, *The Yugoslavian Civil War: An Analysis of the Applicability of the Laws of War Governing Non-International Armed Conflicts in the Modern World*, 10 DICK. J. INT'L L. 303 (1992).

Claims Act and its unique role in the American legal system. Perhaps more than any other federal statute, the Alien Tort Claims Act affirms the law of nations in U.S. courts and the commitment of the United States to protect human rights.

This article examines the *Karadzic* litigation and the implications of the Second Circuit's recent decision. Section I provides a history of the Yugoslav conflict, which provides the basis for the lawsuits in the *Karadzic* litigation. Section II then reviews the complaints filed against *Karadzic* in U.S. district court. Section III analyzes the decision of the district court in *Doe v. Karadzic*. Section IV reviews the decision of the Second Circuit in *Kadic v. Karadzic*. Finally, Section V analyzes the implications of the *Karadzic* litigation.

I.

THE YUGOSLAV CONFLICT

The Balkans have a long and troubled history.¹⁸ In many respects, the present Yugoslav crisis can be traced to the legendary battle of Kosovo in 1389, where the Orthodox Christian Serbs were defeated by the Muslims of the Ottoman Empire.¹⁹ Kosovo ushered in 500 years of Muslim rule. It was also at Kosovo where the Serbs began their long struggle for nationhood.

With the decline of the Ottoman Empire in the late 19th century, the Serbs increased their struggle for independence.²⁰ During this period of ethnic and political unrest, a Serbian nationalist assassinated Archduke Franz Ferdinand in Sarajevo in June 1914, an act which precipitated the outbreak of World War I.²¹ In 1918, the modern state of Yugoslavia was established. By 1945, six republics were recognized as forming the Yugoslav republic: Serbia, Croatia, Slovenia, Bosnia-Herzegovina, Macedonia and Montenegro.²² Throughout the Cold War, the ethnic divisions in Yugoslavia were held in check by the strength of the

18. See generally, Sabrina Ramet, *Balkan History Haunts Peace Plan*, SEATTLE TIMES, Sept. 17, 1995, at B5; Elizabeth Neuffer, *Vows of Revenge Veil Bosnian Peace Process*, BOSTON GLOBE, Nov. 17, 1995, at 1; Walter Russell Mead, *West Can't Quell Balkan Hatreds, Resentment in Region is Centuries Old*, ATLANTA J. & CONST., Aug. 16, 1992, at D2; FRED SINGLETON, *A SHORT HISTORY OF THE YUGOSLAV PEOPLES* (1985). But see, V.P. Gagnon, Jr., *Serbia's Road to War*, 5 J. DEMOCRACY 117, 118-119 (1994). According to Gagnon, "[t]he conventional wisdom about Yugoslavia's ordeal is that democratization was impossible because of the supposedly ancient ethnic hatreds that burst forth as soon as communist rule ended and that doomed the region to nightmarish violence. Ethnic conflict is thus taken as natural and inevitable, and all analyses flow from that 'fact.' Yet arguments focusing on ancient hatreds as the main cause of the conflict are highly misleading." Gagnon refers to the work of Donald Horowitz who argued that "[h]istory can be a weapon, and tradition can fuel ethnic conflict, but a current conflict cannot generally be explained by simply calling it a revived form of an earlier conflict." DONALD HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 99 (1985). Thus, Gagnon suggests that while ethnic tensions may have existed, they were not "fated to lead to the awful bloodshed" that occurred in the former Yugoslavia. Gagnon, *supra*, at 119.

19. ROBERT KAPLAN, *BALKAN GHOSTS: A JOURNEY THROUGH HISTORY* (1993); ALEX DRAGNICH, *SERBS & CROATS: THE STRUGGLE IN YUGOSLAVIA* (1992).

20. NOEL MALCOM, *BOSNIA: A SHORT HISTORY* (1994); Henry Kissinger, *Serbia Presents World With Inconceivable*, Hous. Chron., Sept. 20, 1992, at A1.

21. HENRY KISSINGER, *DIPLOMACY* 209 (1994).

22. Yugoslavia also contained two autonomous regions: Kosovo and Vojvodina.

Yugoslav leader Marshal Tito and the power of communism.²³ The death of Tito in 1980 and the collapse of communism in Eastern Europe during 1989 and 1990 led to the eventual disintegration of Yugoslavia.²⁴

On June 25, 1991, the Yugoslav republics of Croatia and Slovenia declared their independence from Yugoslavia despite repeated threats by the Yugoslav government that such action would lead to war.²⁵ On June 27, 1991, the armed forces of the Yugoslav federal army attacked Slovenian military forces in order to prevent the secession.²⁶ Hostilities broke out in Croatia in July. Despite repeated calls by the European Union and other members of the international community for the cessation of hostilities, the conflict gradually expanded.²⁷ On September 25, 1991, the Security Council adopted a resolution expressing deep concern about the fighting in Yugoslavia and its consequences for the countries in the region.²⁸ It stated "that the continuation of this situation constitutes a threat to international peace and security."²⁹ The resolution supported an immediate cease-fire and negotiations between the parties.³⁰ It also provided that "all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia."³¹

Throughout the early stages of the conflict, the Security Council issued repeated calls for the cessation of hostilities.³² On February 21, 1992, the Security Council established the United Nations Protection Force ("UNPROFOR").³³ The Security Council authorized its deployment on April 7, 1992.³⁴ The mission of UNPROFOR was to deploy peacekeepers in areas des-

23. See generally, ALESKA DJILAS, *THE CONTESTED COUNTRY, YUGOSLAV UNITY AND COMMUNIST REVOLUTION 1919-1953* (1991); STEVEN BURG, *CONFLICT AND COHESION IN SOCIALIST YUGOSLAVIA: POLITICAL DECISION MAKING SINCE 1966* (1983).

24. Chuck Sudetic, *Ethnic Rivalries Push Yugoslavia To Edge*, N.Y. TIMES, Oct. 14, 1990, at A14.

25. Chuck Sudetic, *Yugoslavia Breaks Apart, 2 Rebel Republics Secede*, INT'L HERALD TRIB., June 26, 1991, at 1. Laura Silber, *Yugoslav PM Pleads with Rebel Republics*, FIN. TIMES (London), June 25, 1991, at 2. The desire for independence stemmed from Serb attempts to dominate the Yugoslav federation.

26. Laura Silber and Judy Dempsey, *Yugoslavia Sends Tanks Against Rebel Slovenia*, FIN. TIMES (London), June 28, 1991, at 1; Carol Williams, *Yugoslav Planes Bomb Key Airports In Slovenia*, L.A. TIMES, June 30, 1991, at A1.

27. For an excellent summary of the dissolution of Yugoslavia and the international response, see Marc Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 AM. J. INT'L L. 569 (1992).

28. Security Council Res. 713 (Sept. 25, 1991).

29. *Id.*

30. *Id.*

31. *Id.*

32.

See Security Council Res. 721 (Nov. 27, 1991); Security Council Res. 724 (Dec. 15, 1991); Security Council Res. 727 (Jan. 8, 1992); Security Council Res. 740 (Feb. 7, 1992).

33. Security Council Res. 743 (Feb. 21, 1992). See also Stanley Meisler, *14,000 Peacekeepers Ok'D For Yugoslavia*, L.A. TIMES, Feb. 22, 1992, at A6; Paul Lewis, *U.N. Votes to Send Force to Yugoslavia*, N.Y. TIMES, Feb. 22, 1992, at A3.

34. Security Council Res. 749 (April 7, 1992).

ignated as United Nations Protected Areas.³⁵ Originally, UNPROFOR was sent to three areas: Eastern Slavonia, Western Slavonia and Krajina. Its mission gradually expanded as the situation in Yugoslavia deteriorated and the conflict spread to Bosnia-Herzegovina.³⁶

In addition to hostilities in Slovenia and Croatia, tensions were increasing in the Yugoslav republic of Bosnia-Herzegovina between Bosnian Serbs, Muslims and Croats. In 1991, the Bosnian Serbs began seeking greater autonomy from the government in Bosnia-Herzegovina and closer ties to the Serbian dominated Yugoslav federal government.³⁷ Under the leadership of Radovan Karadzic, the Bosnian Serbs gradually moved to gain control over large portions of territory in Bosnia-Herzegovina and distance themselves from the Bosnian government.³⁸ In contrast, the Muslim and Croat population of Bosnia-Herzegovina sought independence from the Yugoslav federal government. On March 1, 1992, the republic of Bosnia-Herzegovina held a referendum on whether to seek independence from Yugoslavia.³⁹ While the referendum was boycotted by the Bosnian Serbs, it was approved by a majority of the Bosnian electorate.⁴⁰ The republic of Bosnia-Herzegovina declared independence soon thereafter. The international community formally recognized the independence of Bosnia-Herzegovina in early April.⁴¹ On April 7, 1992, the Bosnian Serbs declared

35. Weller, *supra* note 27, at 584, 585.

36. *Further Report of the Secretary-General Pursuant to Security Council Resolution 749 (1992)*, U.N. SCOR U.N. Doc. S/23844 (1992).

37. In 1991, Bosnian Serb forces began establishing "Serb Autonomous Regions" in Bosnia-Herzegovina. Malcom, *supra* note 20, at 227-232.

38. In October 1991, delegates of the Serbian Democratic Party in the Assembly of Bosnia-Herzegovina, led by Radovan Karadzic, refused to participate in a parliamentary vote concerning the establishment of an independent Bosnia-Herzegovina. HUMAN RIGHTS WATCH, WAR CRIMES IN BOSNIA-HERZEGOVINA 24 (1992); Jonathan S. Landay, *EC Deadline Pushes Bosnia to the Brink*, CHRISTIAN SC. MON., December 20, 1991, at 1. In November 1991, the Bosnian Serbs organized a referendum which sought to distance themselves from the movement to establish the independent state of Bosnia-Herzegovina. Human Rights Watch, *supra* at 24. On December 21, 1991, Karadzic and members of the Serbian Democratic Party established the Assembly of the Serbian People of Bosnia-Herzegovina in Banja Luka, a Serbian stronghold. *Tensions Rise in Bosnia-Herzegovina*, AGENCE FRANCE PRESSE, December 21, 1991. On January 9, 1992, the Bosnian Serbs, under the leadership of Karadzic, declared their intention to form their own state within Bosnia-Herzegovina called the Republika Srpska. The new state would contain territory from six regions of Bosnia-Herzegovina where Bosnian Serbs were the dominant ethnic group. Human Rights Watch, *supra* at 26. On March 27, 1992, the Assembly of the Serbian People of Bosnia-Herzegovina accepted a constitution for the new Republika Srpska. Human Rights Watch, *supra* at 26; Chuck Sudetic, *Bosnia Asking U.N. for Peace Forces*, N.Y. TIMES, March 29, 1992, at A4. On April 2, 1992, the Bosnian Serbs announced that they would no longer recognize the authority of the Bosnian government. They also announced the formation of a Serbian police force. Patrick Moore, *Fighting Continues in Croatia and Bosnia Herzegovina*, Radio Free Europe/Radio Liberty Daily Report, No. 65, April 2, 1992, at 5.

39. Laura Silber, *Bosnia Tense After Vote For Secession*, WASH. POST, March 4, 1992, at A16; *Bosnians Vote On Independence*, CHI. TRIB., March 1, 1992, at 24.

40. Chuck Sudetic, *Turnout in Bosnia Signals Independence*, N.Y. TIMES, March 2, 1992, at A3; Carol J. Williams, *Regional Vote on Yugoslavia Risks Conflict*, L.A. TIMES, March 1, 1992 at A1.

41. The European Community formally recognized the independence of Bosnia-Herzegovina on April 6, 1992. Carol J. Williams, *EC Recognizes Bosnia As Serbs Besiege Capital*, L.A. TIMES, April 7, 1992, at A1; Charles Goldsmith, *EC, Hoping to End Fighting, Recognizes Bosnia-Herzegovina*, INT'L HERALD TRIB., April 7, 1992, at 1. The United States recognized independence on

their independence from Bosnia-Herzegovina and the establishment of the Republika Srpska.⁴² The situation deteriorated rapidly in Bosnia-Herzegovina as fighting broke out between the Bosnian Serbs, Muslims and Croats.⁴³ The Bosnian government was hampered in its struggle against the Bosnian Serbs because of the U.N. sponsored arms embargo, which continued to apply to the states of the former Yugoslavia.⁴⁴ Aided by the Serbian government, the Bosnian Serbs soon gained control over many disputed areas.⁴⁵

With the escalation of hostilities, the United Nations increased its involvement in the Yugoslav conflict.⁴⁶ The Security Council adopted several resolutions urging the parties to accept a cease-fire and a mediated solution to the conflict.⁴⁷ Several U.N.-brokered agreements, however, failed to stop the fighting.⁴⁸ The Security Council also established "no fly zones" and designated safe

April 7, 1992. David Binder, *U.S. Recognizes 3 Yugoslav Republics As Independent*, N.Y. TIMES, April 8, 1992 at A10.

42. Ian Traynor, *Bosnia's Freedom Born in Violence*, THE GUARDIAN, April 8, 1992, at 5. The Republika Srpska quickly sought to establish relations with the international community. On April 16 1992, the Presidency and the Government of the Republika Srpska announced the establishment of relations with the Serbian government in Belgrade. It also announced that it would seek recognition from the European Community and membership in the Conference on Security and Cooperation in Europe. Human Rights Watch, *supra* note 38, at 26; *EC Recognition Sought*, FBIS, April 17, 1992 at 35. On May 12, 1992, Karadzic announced the formation of a military force for the Republika Srpska. John F. Burns, *Cease-Fire Brings Bit of Calm but No Confidence to Sarajevo*, N.Y. TIMES, May 14, 1992; Human Rights Watch, *supra* note 38, at 36.

43. Chuck Sudetic, *Bosnia, Awash in Violence Reins in Militias*, N.Y. TIMES, April 9, 1992, at A9; Traynor, *supra* note 42, GUARDIAN, April 8, 1992, at 5; Laura Silber, *Angry Serbs Barricade Bosnian City*, WASH. POST, March 3, 1992, at A13.

44. Barbara Crossette, *U.N. Assembly Approves Call for End to Bosnian Arms Embargo*, N.Y. TIMES, Nov. 4, 1994, at A3; Tyler Marshall, *Just What Went Wrong in Bosnia?* L.A. TIMES, Dec. 11, 1994, at A1; Stanley Hoffmann, *What Will Satisfy Serbia's Nationalists?* N.Y. TIMES, Dec. 4, 1994, at A19.

45. Roger Cohen, *Yugoslavia Role in Bosnia*, N.Y. TIMES, March 22, 1992, at A6. According to Human Rights Watch, "it is well known that the government of Yugoslavia, and in particular, the government of the Republic of Serbia, have provided economic, military and political support to Bosnian Serbs fighting against the forces of Bosnia-Herzegovina. Human Rights Watch, *supra* note 38, at 47-48.

46. On May 22, 1992, the U.N. General Assembly admitted Bosnia-Herzegovina, Croatia and Slovenia as members of the United Nations. See G.A. Res. 236, U.N. GAOR, 46th Sess., Supp. No. 49A, at 5, U.N. Doc. 46/236 (1992); G.A. Res. 237, U.N. GAOR, 46th Sess., Supp. No. 49A, at 5, U.N. Doc. 46/237 (1992); G.A. Res. 238, U.N. GAOR, 46th Sess., Supp. No. 49A, at 5, U.N. Doc. 46/238 (1992). On Sept. 22, 1992, the General Assembly voted to ban Yugoslavia from voting and participating in the General Assembly and its committees. G.A. Res. 1, U.N. GAOR, 47th Sess., Supp. No. 49, at 12, U.N. Doc. 47/1 (1992).

47. Security Council Res. 752 (May 15, 1992); Security Council Res. 770 (August 13, 1992).

48. Paul Lewis, *Bosnia Peace Talks Yield No Progress*, N.Y. TIMES, Feb. 8, 1993, at A10; Chuck Sudetic, *Bosnia Peace Plan Said to Spur New Attacks by Serbs*, N.Y. TIMES, Feb. 8, 1993, at A10.

The Vance-Owen proposal of 1992 divided Bosnia into ten semi-autonomous provinces. Radovan Karadzic, the leader of the Bosnian Serbs, signed the plan on May 2, 1993. The plan was rejected, however, by the Serbian Assembly on May 15th. Daniel Williams, *Three-Way Partition of Bosnia; Realities of War Come to Fore; Vance-Owen Plan of Multiethnic Makeup Seems to Evaporate*, WASH. POST, June 19, 1993, at A12; *The Forlorn Hope*, THE ECONOMIST, Aug. 7, 1993, at 17. The Owen-Stoltenberg proposal sought to divide Bosnia-Herzegovina into three autonomous regions, each with the right to eventually annex to a neighboring country. This plan was rejected in December 1993. Other peace proposals sought to divide Bosnia-Herzegovina into two entities. The Bosnian Serbs would control 49% of Bosnian territory while a federation of Muslims and Croats

areas throughout Bosnia-Herzegovina to prevent further attacks by the Bosnian Serbs against the non-Serb population.⁴⁹ In addition, U.N. peacekeepers were sent to protect these areas and provide humanitarian assistance to the millions of refugees that had been displaced because of the conflict.⁵⁰ Despite these efforts, the Bosnian Serbs continued to attack the protected areas and interfere with U.N. relief efforts.⁵¹ The city of Sarajevo, once a proud symbol of Yugoslavia's ethnic diversity, was subject to extensive bombing and sniper attacks by the Bosnian Serbs.⁵² In addition, U.N. peacekeepers were taken hostage by the Bosnian Serbs to prevent military reprisals by NATO aircraft.⁵³

Throughout the conflict, numerous allegations of human rights violations were made against the Bosnian Serbs.⁵⁴ Reports indicated that the Bosnian Serbs were conducting a massive campaign of genocide against the non-Serb population. These reports cited numerous atrocities, including mass executions, torture and rape of military prisoners and the civilian population. By the summer of 1992, it was evident that the Bosnian Serbs were conducting a campaign of ethnic cleansing, seeking to eliminate all traces of the non-Serb population from Bosnia-Herzegovina.⁵⁵

The Security Council remained seized of the situation and persisted in attempts to have the Bosnian Serbs comply with international norms and legal obligations. On July 13, 1992, the Security Council adopted a resolution which reaffirmed the obligation of all parties to comply with international humanitarian

would control 51%. The Bosnian Serbs rejected these proposals because they required them to cede control over Bosnian territory. Tyler Marshall, *Just What Went Wrong in Bosnia?* L.A. TIMES, December 11, 1994, at A1; Chuck Sudetic, *Belgrade Issues Warning to Bosnian Serbs*, N.Y. TIMES, August 3, 1994, at A10.

49. Security Council Res. 781 (Oct. 9, 1992); *No Fly Zone Over Bosnia Ok'd By U.N.*, L.A. TIMES, Oct. 10, 1992, at A8; *See also*, Security Council Res. 786 (Nov. 10, 1992); Security Council Res. 816 (March 31, 1993); Security Council Res. 819 (April 16, 1993); Security Council Res. 836 (June 3, 1993).

50. Stanley Meisler, *UN Calls For At Least 7,500 Troops for Bosnian Safe Areas*, L.A. TIMES, June 15, 1993, at A10; Frank Prial, *U.N. Resolution Establishes Safe Areas But Lacks Enforcement Provisions*, N.Y. TIMES, May 7, 1993, at A11.

51. *See* Carol Williams, *The Shadow of a Shield: Amid Deepening Violence, U.N. Forces In Bosnia Have Come to Symbolize Not Hope But Impotence*, L.A. TIMES MAG. July 25, 1993, at 16; David Hackworth, *The Blockade is a Joke*, Newsweek, Oct. 12, 1992, at 46.

52. *See, e.g.*, William Tuohy, *Bosnian Serbs Quit Peak Near Sarajevo*, L.A. TIMES, August 10, 1993, at A1; Kim Murphy, *8 Die in Sarajevo Funeral Shelling*, L.A. TIMES, June 13, 1993, at A7.

53. Joel Brand and Juliana Mojsilovic, *Serbs Take Hostages After Airstrike*, WASH. POST., May 27, 1995, at A1; Roger Cohen, *A High Risk Road, With No Return Trip; Raids Counterproductive*, INT'L HERALD TRIB., May 27, 1995, at 1.

54. *See generally*, Andrew Bell-Fialkoff, *A Brief History of Ethnic Cleansing*, 72 FOREIGN AFF. 110 (Summer 1993); U.S. DEP'T OF STATE, 1993 HUMAN RIGHTS REPORT: SERBIA/MONTENEGRO HUMAN RIGHTS PRACTICES 1 (1993); AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: GROSS ABUSES OF HUMAN RIGHTS (1992); Human Rights Watch, *supra* note 38, at *passim*; Stephen Engelberg, *Conflict in the Balkans: In Enemy Hands*, N.Y. TIMES, Aug. 16, 1992, at 1; Chuck Sudetic, *Bosnians Provide Accounts of Abuse in Serbian Camps*, N.Y. TIMES, Aug. 4, 1992, at A6.

55. Ethnic cleansing is defined as "rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area." Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), Annex, at 33, U.N. Doc. S/1994/674/Annex (1994).

law and, in particular, the 1949 Geneva Conventions.⁵⁶ The resolution provided “that persons who commit or order the commission of grave breaches of the [1949 Geneva] Conventions are individually responsible in respect of such breaches.”⁵⁷ On August 13, 1992, the Security Council reiterated its concern at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia-Herzegovina, “including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centres, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property.”⁵⁸ This resolution condemned “any violations of international humanitarian law, including those involved in the practice of ethnic cleansing.”⁵⁹ It added that “all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia-Herzegovina, immediately cease and desist from all breaches of international humanitarian law.”⁶⁰ The resolution also requested that states and international organizations begin gathering information relating to the violations of international humanitarian law being committed in the territory of the former Yugoslavia.⁶¹

On October 6, 1992, the Security Council requested the Secretary-General to establish an impartial Commission of Experts to investigate alleged human rights abuses.⁶² The Commission was to provide “the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.”⁶³ The Commission issued an interim report in February 1993 which concluded that grave breaches and other violations of international humanitarian law had been committed including ethnic cleansing, willful killing, mass killings, torture, rape, pillage and destruction of civilian property, destruction of cultural and religious property and arbitrary arrest.⁶⁴ Following

56. Security Council Res. 764 (July 13, 1992). The four Geneva Conventions of 1949 are: (1) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, entered into force Oct. 21, 1950, 6 U.S.T. 3114, T.I.A.S. 3362, 75 U.N.T.S. 31; (2) Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked members of Armed Forces at Sea, entered into force Oct. 21, 1950, 6 U.S.T. 3217, T.I.A.S. 3363, 75 U.N.T.S. 85; (3) Convention Relative to the Treatment of Prisoners of War, entered into force Oct. 21, 1950, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135; and (4) Convention Relative to the Protection of Civilian Persons in Time of War, entered into force Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

57. Security Council Res. 764, *supra* note 56.

58. Security Council Res. 771 (Aug. 13, 1992).

59. *Id.*

60. *Id.*

61. *Id.*

62. Security Council Res. 780 (Oct. 6, 1992). See also, M. Cherif Bassiouni, *The United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, 88 AM. J. INT'L L. 784 (1994); Paul Lewis, *U.N. Backs Inquiry in the Balkans to Discover Possible War Crimes*, N.Y. TIMES, Oct. 7, 1992, at A1.

63. Security Council Res. 780, *supra* note 62, at para. 2.

64. *Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)*, U.N. Doc. S/25274 (Feb. 10, 1993).

the submission of the Commission's interim report, the Security Council adopted a resolution on February 22, 1993 reiterating its alarm at the widespread violations of international humanitarian law.⁶⁵ It provided "that an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."⁶⁶ The resolution also requested the Secretary-General to submit a report on the establishment of an international tribunal. The Secretary-General submitted its report to the Security Council on May 3, 1993.⁶⁷ The report examined the organization and procedures for the proposed International Tribunal and also contained a draft Statute of the International Tribunal.⁶⁸

On May 25, 1993, the Security Council adopted a resolution to formally establish an international tribunal "for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia."⁶⁹ The tribunal will have "the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."⁷⁰ Specifically, the Tribunal shall have the power to prosecute persons who committed or ordered others to commit grave breaches of the 1949 Geneva Conventions, the laws of war, genocide and crimes against humanity. The Tribunal affirms the principle of individual responsibility by providing that "[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" shall be individually responsible for the crime.⁷¹ To date, several individuals, including Bosnian Serb military and political leaders, have been indicted by the War Crimes Tribunal.⁷² Despite the es-

65. Security Council Res. 808 (Feb. 22, 1993). See Daniel Pickard, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U.L. REV. 435 (1995).

66. Security Council Res. 808, *supra* note 65.

67. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (1993), reprinted in 32 I.L.M. 1159 (1993).

68. *Id.*

69. Security Council Res. 827 (May 25, 1993). See also, Howard Levie, *The Statute of the International Tribunal for the Former Yugoslavia*, 21 SYRACUSE J. INT'L L. & COM. 1 (1995); M. Cherif Bassiouni, *Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal*, 18 FORDHAM INT'L L. J. 1192 (1995); James O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J. INT'L L. 39 (1993); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, 72 FOREIGN AFF. 122 (Summer 1993).

The Security Council also established a criminal tribunal for Rwanda following reports of mass human rights abuses. See Security Council Res. 935, U.N. Doc. S/RES/935 (1994), Security Council Res. 955, U.N. Doc. S/RES/955 (1994).

70. 32 I.L.M. *supra* note 67 at 1170. The Statute of the International Tribunal recognizes that international humanitarian law consists of both conventional law and customary law. *Id.*

71. The Tribunal cannot try defendants *in absentia*. It can impose life imprisonment on defendants who are convicted but it cannot impose a death sentence.

72. Mary Williams Walsh, *A Tribunal in a Time of Atrocities*, L.A. TIMES, Aug. 30, 1995, at A1. Approximately 52 individuals have been indicted by the Tribunal. See also, International Criminal Tribunal for the Former Yugoslavia: Indictments Against Meakic and Others and Tadic and Other, reprinted in 34 I.L.M. 1011 (1995). Jane Perley, War Crimes Tribunal On Bosnia is Ham-

establishment of the Tribunal, human rights violations continued in Bosnia-Herzegovina.⁷³

In the summer of 1995, several events played a pivotal role in changing the nature of the Yugoslav conflict. In July 1995, the Bosnian Serbs overran the U.N. designated safe areas of Srebrenica and Zepa.⁷⁴ Several thousand Muslim men were allegedly massacred in Srebrenica by the Bosnian Serbs.⁷⁵ On August 28, 1995, a mortar attack in Sarajevo killed at least 37 people, resulting in further international condemnation.⁷⁶ These atrocities led to significant airstrikes by NATO aircraft against Bosnian Serb forces throughout Bosnia-Herzegovina.⁷⁷ At the same time, Croatian and Bosnian forces made significant military advances against the Bosnian Serbs.⁷⁸ The rapidly changing nature of the Yugoslav conflict led to a cease-fire on October 12, 1995 and a new round of peace negotiations.⁷⁹

In November 1995, the leaders of Bosnia-Herzegovina, Croatia and Yugoslavia (Serbia and Montenegro) began negotiations in Dayton, Ohio under U.S. auspices.⁸⁰ On November 21, 1995, the warring sides reached an accord to end

pered By Basic Problems, N.Y. TIMES, Jan. 28, 1996, at A1; Jonathan Randal, UN Tribunal Orders Arrest of Karadzic and Mladic, INT'L HERALD TRIB., July 12, 1996, at 1.

73. Security Council Res. 1019 (Nov. 10, 1995); Security Council Res. 941 (Sept. 26, 1994).

On March 20, 1993, the government of Bosnia-Herzegovina instituted proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro) in the International Court of Justice. The application alleged that Yugoslavia was in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. On April 8, 1993, the ICJ issued a series of provisional orders. It ruled that Yugoslavia should immediately take all measures within its power to prevent the commission of the crime of genocide. It also ruled that Yugoslavia should ensure that any military or paramilitary units which be directed or supported by it do not commit any acts of genocide. Finally, it ruled that both Yugoslavia and Bosnia-Herzegovina should not take any action which may aggravate or extend the existing dispute. Order on Request for the Indication of Provisional Measures in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) *reprinted in* 32 I.L.M. 888 (1993). The government of Bosnia-Herzegovina requested additional provisional measures from the International Court of Justice on July 27, 1993. On September 13, 1993, the International Court of Justice reaffirmed the provisional measures of its earlier order. Order on Further Requests for the Indication of Provisional Measures in Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) *reprinted in* 32 I.L.M. 1599 (1993).

74. Tracy Wilkinson, *Serbs Set Sights on Second Enclave, Shell Peacekeepers*, L.A. TIMES, July 15, 1995, at A1; *Srebrenica Falls to Bosnian Serbs*, CHI. TRIB., July 11, 1995, at 1.

75. Ray Mosley, *Bosnian Massacre Bodies To Be Dug Up; War Crimes Panel To Send Recovery Teams To Srebrenica*, CHI. TRIB., Dec. 12, 1995, at 8; Barbara Crossette, *From Overrun Enclave, New Evidence of Mass Killings*, N.Y. TIMES, Aug. 19, 1995, at A4. Tracy Wilkinson, *Unearthed Remains Point to Systematic Killings*, L.A. TIMES, August 21, 1996, at A1.

76. Roger Cohen, *Shelling Kills Dozen in Sarajevo*, N.Y. TIMES, Aug. 29, 1995, at A1; 35 *Killed in Sarajevo Market Area*, CHI. TRIB., Aug. 28, 1995, at 1.

77. Roger Cohen, *NATO Presses Bosnian Bombing*, N.Y. TIMES, Aug. 31, 1995, at A1; Art Pine and Tracy Wilkinson, *In Sweeping Strikes, U.S., Allies Mete Out Punishment to Serbs*, L.A. TIMES, Aug. 30, 1995, at A1.

78. *Croatia Claims New Victory in Bosnia*, CHI. TRIB., Aug. 18, 1995 at 1; Michael Dobbs, *In the Balkans, The Tables are Turned*, WASH. POST, Aug. 31, 1995, at 1.

79. Bruce Clark, *Bosnian Peace Signing: West's Antidote For Balkans War Fever*, FIN. TIMES, Dec. 14, 1995, at 3; Tracy Wilkinson, *Balkan Negotiators Face Huge Hurdles*, L.A. TIMES, Oct. 29, 1995, at A1; Tracy Wilkinson, *Guns Are Silent in Bosnia; Humanitarian Abuses Persist*, L.A. TIMES, Oct. 23, 1995, at A4.

80. Dirk Johnson, *Bemused Dayton Awaits Peace Talks*, N.Y. TIMES, Oct. 29, 1995, at A24.

the Yugoslav conflict.⁸¹ The agreement established a single Bosnian state, composed of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska.⁸² The Federation of Bosnia and Herzegovina controls 51% of the territory, and the Republika Srpska controls the remaining 49%. Under the terms of the agreement, a central government will be elected through democratic elections held under international supervision. Individuals charged with war crimes will be unable to hold public office. Refugees are allowed to return to their homes and the freedom of movement will be guaranteed for all Bosnians. An Implementation Force (IFOR) was established to enforce the agreement.⁸³ The Implementation Force consists primarily of military personnel from NATO countries, although personnel from several non-NATO countries also participate.⁸⁴ Several international organizations, including the United Nations, the Red Cross, the European Union and the Organization for Security and Cooperation in Europe are responsible for rebuilding the war-torn country. The General Framework Agreement was signed by the parties on December 14, 1995 in Paris.⁸⁵ Implementation of the agreement began immediately.⁸⁶

The consequences of the Yugoslav conflict are significant. Over 200,000 people, mostly civilians, died in the conflict. Millions more became refugees. Along with the rows of gravestones that mark the Bosnian landscape, the memories of war, for both young and old, will linger long after the fighting ends.⁸⁷

II.

THE COMPLAINTS

On February 11, 1993, Jane Doe I and Jane Doe II, on behalf of themselves and the members of their respective classes, filed a complaint against Radovan Karadzic for human rights violations committed by forces under his command

81. The agreement was reached between Serbian President Slobodan Milosevic, Croatian President Franjo Tudjman and Bosnian President Alija Izetbegovic. See, Elaine Sciolino, *Balkan Accord: The Overview*, N.Y. TIMES, Nov. 22, 1995, at A1; Norman Kempster and Art Pine, *Bosnia Peace Treaty Approved*, L.A. TIMES, Nov. 22, 1995, at A1.

82. Roy Gutman, *New Questions for New Agreement*, NEWSDAY, Nov. 22, 1995, at A14.

83. The Security Council authorized the establishment of IFOR. Security Council Res. 1031 (Dec. 18, 1995).

84. Tyler Marshall, *More At Stake Than Bosnia For NATO-Led Forces*, L.A. TIMES, Dec. 17, 1995, at A1; Art Pine, *U.S. Troops Arrive in Bosnia in Mid-December*, L.A. TIMES, Dec. 2, 1995, at A1.

85. William Drozdiak and John Harris, *Leaders Sign Pact to End Bosnian War*, WASH. POST, Dec. 15, 1995, at A1; Scott Kraft and Paul Richter, *3 Balkan Leaders Sign Treaty*, L.A. TIMES, Dec. 15, 1995, at A1; Bruce Clark, *Bosnian Peace Signing*, FIN. TIMES, Dec. 14, 1995, at 3.

86. Tracy Wilkinson and Dean Murphy, *Bosnia Foes Pull Back; Many POWs Still Held*, L.A. TIMES, Jan. 20, 1996, at A1. Bosnia Peace Process: Hearings Before the Senate Foreign Relations Committee, 104 Cong., 2nd Sess. (1996).

87. Despite the peace process, animosity continues to exist between the warring sides. See Elizabeth Neuffer, *Vows of Revenge Veil Bosnia Peace Process*, BOSTON GLOBE, Nov. 12, 1995, at 1; Sabrina Ramet, *Balkan History Haunts Peace Process*, SEATTLE TIMES, Sept. 17, 1995, at B5. Land mines are also a constant and deadly reminder of the Yugoslav conflict. See, e.g., Nora Zamichow, *Clearing Mines Meant for Each Other*, L.A. TIMES, Jan. 13, 1996, at A8; Nora Zamichow, *For Some GIs, Bosnia Is a Big Minefield*, L.A. TIMES, Jan. 8, 1996, at A1.

and control in Bosnia-Herzegovina.⁸⁸ The complaint was filed in the U.S. district court for the Southern District of New York.⁸⁹ Federal jurisdiction was claimed under several federal statutes including the Alien Tort Claims Act, the Torture Victim Protection Act (“TVPA”) and the federal question statute.⁹⁰ According to the complaint, Karadzic had command authority over the Bosnian Serb military forces and bears legal responsibility for the crimes committed by his troops.⁹¹ Specifically, Karadzic was charged with having ordered and directed the following torts committed in violation of the law of nations: genocide, war crimes and crimes against humanity, summary execution, torture, cruel, inhuman or degrading treatment, wrongful death, assault and battery, and intentional infliction of emotional harm.⁹² The complaint sought compensatory and punitive damages.⁹³ Karadzic was served with the Doe complaint on February 11, 1993 while visiting the United States as an invitee of the United Nations.⁹⁴

88. Complaint, *Doe v. Karadzic*, (S.D.N.Y. 1993) (No. 93 Civ. 0878 PKL). Jane Doe alleged that she was raped, beaten and stabbed by Bosnian-Serb soldiers while in a detention camp. Jane Doe II stated that Bosnian-Serb soldiers raped and murdered her mother. Both women filed their complaint anonymously out of fear for their safety if their identity were revealed. They filed the action on their own behalf and as representatives of all others similarly situated. The complaint states that “[t]he class consists of all women and men who suffered rape, summary execution, other torture, or other cruel, inhuman or degrading treatment inflicted by Bosnian-Serb military forces under the command and control of defendant between April 1992 and the present.” *Id.* at 4.

89. *Id.*

90. *Id.* at 2.

91. *Id.* at 1, 3. The complaint also alleged that Karadzic had received the support of the Yugoslav government and military. *Id.* at 3.

92. The complaint stated that the causes of action arise under, among others, under the following laws agreements, resolutions and treaties:

customary international law, United Nations Charter, Universal Declaration of Human Rights, Genocide Convention, International Covenant on Civil and Political Rights, 1949 Geneva Conventions, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Declaration on the Protection of All Persons From Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Standard Minimum Rules for the Treatment of Prisoners, European Convention for the Protection of Human Rights and Fundamental Freedoms, the common law of the United States, statutes and common law of the State of New York and the laws of Bosnia-Herzegovina.

Complaint, *Doe v. Karadzic*, *supra* note 88, at 2-3.

93. *Id.*

94. However, Karadzic has argued that he was not properly served with the Doe complaint. *Doe*, 866 F. Supp. at 736-737. According to the account provided by the district court:

On February 11, 1993, the same day the Doe Complaint was filed, Jonathan Soroko attempted to effect service on Karadzic in the lobby of Karadzic’s hotel, the Hotel Inter-Continental, 111 East 48th Street, New York, New York. At the time, Karadzic was surrounded by a security detachment led by Special Agent R.A. Diebler, a Special Agent of the Diplomatic Security Service of the United States Department of State. When Soroko attempted to serve Karadzic, Diebler’s security team executed a procedure designed to cover and evacuate Karadzic, forming a ring around Karadzic and rushing him into the elevator. The record contains conflicting affidavits regarding the attempted service. Soroko contends that he was no more than two feet from defendant, while Diebler contends that “the man could not have gotten any closer to Dr. Karadzic than 6-8 feet at the most.” It is not disputed, however, that during the attempted service, Soroko called out words declaring that defendant was served. Diebler asserts that prior to leaving the United States, Karadzic had no knowledge that Soroko was attempting to serve him with process.

Id. at 737 (citations omitted).

On March 2, 1993, a similar complaint was filed against Karadzic by S. Kadic, on her own behalf and on behalf of her children, and by two women's organizations, Internacionalna Inicijativa Zena Bosne I Hercegovine "Biser" and Zene Bosne I Hercegovine.⁹⁵ Federal jurisdiction was also claimed under the Alien Tort Claims Act, the Torture Victim Protection Act and the federal question statute.⁹⁶ According to the complaint, Karadzic was President of the Serbian Republic of Bosnia-Herzegovina and commander of the Bosnian Serb military.⁹⁷ Karadzic was charged with having ordered and directed the following actions: genocide, rape, enforced prostitution, forced pregnancy, torture, wrongful death and extrajudicial killing, and sex and ethnic inequality.⁹⁸ The complaint sought injunctive relief as well as compensatory and punitive damages.⁹⁹ Karadzic was served with the Kadic complaint on March 5, 1993, while visiting the United States as a United Nations invitee.¹⁰⁰

95. Complaint, *Kadic v. Karadzic*, (S.D.N.Y. 1993) (No. 93 Civ. 1163) (PKL). Kadic is a Croatian Muslim citizen of Bosnia-Herzegovina. Kadic alleged that she was forcibly ejected from her home and that one of her children was decapitated by a Serbian soldier as she held him in her arms. She was subsequently interned in a Serbian detention camp where she was repeatedly raped by Serbian soldiers. Internacionalna Inicijativa Zena Bosne i Hercegovine "Biser" is a women's organization formed to assist victims of the war in Bosnia-Herzegovina. Similarly, Zene Bosne i Hercegovine is an organization that coordinates relief efforts on behalf of victims of the war in Bosnia-Herzegovina. *Id.* at 4-5.

96. *Id.* at 2.

97. *Id.* at 1. The complaint also alleged that Karadzic had received the support of the Yugoslav government. *Id.* at 1-2.

98. The complaint stated that the causes of action arise, among others under the following laws, agreements, resolutions and treaties:

customary international law, the Convention the Prevention and Punishment of Genocide, the 1949 Geneva Conventions, 1977 Protocol II, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, United Nations Charter, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, European Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention of the Suppression of the Traffic in Women and Children, the International Convention for the Suppression of the Traffic in Persons, the United Nations Standard Minimum Rules for the Treatment of Prisoners, 28 U.S.C. Section 1350, 106 Stat. 73 (March 12, 1992), the Constitution of the United States Amendments XIII and XIV, the common law of the United States of America, the laws of the State of New York, including but not limited to common law principles of rape, sex discrimination, wrongful death, false imprisonment, assault and battery, invasion of privacy, intentional infliction of emotional distress, and respondeat superior; and the laws of Bosnia-Herzegovina.

Complaint, *Kadic v. Karadzic*, *supra* note 95, at 3.

99. Unlike the Doe complaint, the Kadic complaint requested injunctive relief, "to wit, that Defendant Karadzic be enjoined from ordering, or from permitting to occur under his command, any genocidal acts of "ethnic cleansing," including wrongful death and extrajudicial killing, rape, other forms of torture, forced pregnancy, forced prostitution, forced relocation and detention, and other acts of sex and ethnic discrimination directed against the Muslim and Croatian women and children of Bosnia-Herzegovina." *Id.* at 19.

100. The complaint was filed on March 2, 1993. After several attempts of service proved unsuccessful, a district court granted a motion for leave to effect service upon defendant by alternative means. On March 5, 1993, a copy of the summons and complaint was delivered to a member of the Diplomatic Security Service of the Department of State, who personally served Karadzic. *Kadic*, 866 F. Supp. at 737.

On May 10, 1993, Karadzic filed a motion to dismiss both actions.¹⁰¹ The motion was filed "pursuant to Fed. R. Civ. P. 12(b)(1), (2), (4), (5) & (6) on grounds of lack of subject matter and personal jurisdiction, insufficiency of process and service of process and nonjusticiability of plaintiffs' claims."¹⁰² Specifically, Karadzic argued that service of process upon a U.N. invitee violated the U.N. Headquarters Agreement. He also alleged that service of process violated "well established judicially developed principles designed to protect and prevent interference" with U.N. peacekeeping functions.¹⁰³ Finally, he argued that service of process was unreasonable and violated due process of law because of his transitory presence in New York.¹⁰⁴

III.

DOE V. KARADZIC: THE DISTRICT COURT'S RULING

On September 7, 1994, the district court granted Karadzic's motion to dismiss. As a preliminary matter, the district court indicated that Karadzic's status as a potential head of state militated against the exercise of jurisdiction. According to the court, "[w]ere the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction. This consideration, while not dispositive at this point in the litigation, militates against this Court exercising jurisdiction over the instant action."¹⁰⁵

The district court then proceeded to examine whether it had subject matter jurisdiction. While this issue was not raised by Karadzic, the court indicated that it could raise the issue *sua sponte*.¹⁰⁶ Specifically, the district court examined the three jurisdictional claims asserted by the plaintiffs: (A) the Alien Tort Claims Act; (B) the Torture Victim Protection Act; and (C) the federal question statute.

101. Defendant's Notice of Motion to Dismiss Action Before Answer, Doe v. Karadzic, (No. 93 CIV 878).

102. *Id.* at 1-2.

103. Defendant's Memorandum in Support of Motion to Dismiss Before Answer, Doe, (No. 93 CIV 878), at 2.

104. In addition, Karadzic alleged that he was not properly served with the Doe complaint. Affidavit of Ramsey Clark Attached to Defendant's Memorandum in Support of Motion to Dismiss Before Answer, Doe, (No. 93 CIV 878), at 12.

105. Doe, 866 F. Supp. at 738.

106. *Id.* Indeed, in the Defendant's Memorandum in Support of Motion to Dismiss Before Answer, Karadzic indicated that "[t]he questions of subject matter jurisdiction and the justiciability of plaintiffs' claims that this case presents involve difficult and complex factual and legal inquiries, as for example, into the status of defendant's government as a state under international law, the application of head of government immunity and the act of state doctrine. Although defendant believes these jurisdictional issues should be resolved on motion before answer, if they need to be reached, thorough briefing and consideration of these issues seems premature and inadvisable now in view of the strength of defendant's claim to dismissal for lack of personal jurisdiction, and insufficiency of process and service of process." Defendant's Memorandum in Support of Motion to Dismiss Before Answer, Doe v. Karadzic, *supra* note 103, at 11.

A. Alien Tort Claims Act

As indicated, the Alien Tort Claims Act provides that “[t]he district courts shall have original jurisdiction of any civil action brought by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹⁰⁷ The district court examined whether the Alien Tort Claims Act provided jurisdiction and “whether the actions of defendant, alleged herein, constitute an actionable violation of the law of nations under the statute.”¹⁰⁸

The district court began its analysis by noting that the Second Circuit “has found that only conduct which rises to the level of an ‘international common law tort’ by violating universally accepted standards of human rights is within the law of nations, and thus within the subject-matter jurisdiction of the Act.”¹⁰⁹ The court recognized that international law applied primarily to conduct between states.¹¹⁰ It then examined the Second Circuit’s earlier decision in *Filaritiga v. Pena-Irala*, one of the first cases to address the Alien Tort Claims Act. In *Filaritiga*, the plaintiffs brought an action pursuant to the ATCA against a former Paraguayan official for acts of torture. The plaintiffs alleged that official torture violated the law of nations. The district court dismissed the action on jurisdictional grounds, holding that the term “law of nations,” as employed in Section 1350, excludes “that law which governs a state’s treatment of its own citizens.”¹¹¹ On appeal, the Second Circuit examined whether official torture is prohibited by the law of nations. The court concluded that “[i]n light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights, and hence the law of nations.”¹¹² This violation occurs regardless of the nationality of the parties.¹¹³ The Second Circuit then noted that the law of nations has always been part of the federal common law.¹¹⁴ “The law of nations forms an integral part of the

107. 28 U.S.C. § 1350.

108. Doe, 866 F.Supp. at 738.

109. *Id.* at 738-739.

110. *See, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964) (“traditional view of international law [was] that it established substantive principles for determining whether one country had wronged another.”).

111. *Filaritiga*, 630 F.2d at 880. The district court had referred to a recent opinion by the Second Circuit which commented in dictum that “violations of international law do not occur when the aggrieved parties are nationals of the acting state.” *Dreyfus v. von Finck*, 534 F.2d 24, 31 (1976). *See also, IIT v. Vencap, Ltd.*, 519 F.2d at *passim*.

112. *Filaritiga*, 630 F.2d at 880. The Second Circuit examined several sources of international law including the U.N. Charter, several General Assembly resolutions, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms.

113. *Id.* at 877. The Court indicated that “the dictum in *Dreyfus v. von Finck* . . . to the effect that ‘violations of international law do not occur when the aggrieved parties are nationals of the acting state,’ is clearly out of tune with the current usage and practice of international law.” *Id.* at 884.

114. *Id.* at 885.

common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.¹¹⁵ This provides the constitutional basis for the Alien Tort Claims Act.¹¹⁶ Thus, the Second Circuit held that “whenever an alleged torturer is found and served with process by an alien within our borders, § 1350 provides federal jurisdiction.”¹¹⁷

The district court in *Doe* also examined *Tel-Oren v. Libyan Arab Republic*,¹¹⁸ a decision by the Court of Appeals for the District of Columbia. In *Tel-Oren*, survivors and representatives of individuals murdered in a terrorist attack by members of the Palestine Liberation Organization (“PLO”) filed an action for compensatory and punitive damages in federal court. Jurisdiction was claimed under four separate statutes including the Alien Tort Claims Act. The district court dismissed the action for lack of subject-matter jurisdiction and as barred by the statute of limitations.¹¹⁹ In a *per curiam* decision, the District of Columbia Circuit panel affirmed the dismissal of the action although the three judge panel wrote separate concurring opinions. In his concurring opinion, Judge Edwards noted that the law of nations does not impose the same responsibility or liability on non-state actors as it does on states and persons acting under color of state law.¹²⁰ Since the PLO was not a recognized state and did not act under color of any recognized state law, the case was distinguishable from *Filartiga*, where the Paraguayan official acted under color of law. Judge Edwards stated that he was unwilling to “venture out of the conformable realm of established international law — within which *Filartiga* firmly sat — in which states are the actors.”¹²¹ According to Judge Edwards, the degree of codification and consensus on the liability of non-state actors for violations of international law is “simply too slight.”¹²²

In the *Doe* case, the district court argued that both *Filartiga* and *Tel-Oren* reinforce the conclusion that “acts committed by non-state actors do not violate the law of nations.”¹²³ The district court cited several other cases which also indicated that the Alien Tort Claims Act does not cover the conduct of non-state actors.¹²⁴ Indeed, the district court indicated that courts have only found causes of action under the Alien Tort Claims Act when “state actors violated the law of

115. *Id.* at 886.

116. *Id.*

117. *Id.* at 877.

118. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984).

119. *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981).

120. *Tel-Oren*, 726 F.2d at 776. In their concurring opinions, Judge Bork held that the Alien Tort Claims Act does not provide a cause of action, and Judge Robb held that the political question doctrine barred adjudication of the claim.

121. *Id.* at 792.

122. *Id.*

123. *Doe*, 866 F. Supp. at 739.

124. See *Linder v. Calero Portocarrero*, 747 F. Supp. 1452, 1462 (S.D. Fla. 1990); *Carmichael v. United Technologies Corp.*, 835 F.2d 109, 113 (5th Cir. 1988); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987).

nations.”¹²⁵ In *Sanchez-Espinoza v. Reagan*,¹²⁶ Nicaraguan citizens brought suit, under several causes of action including the Alien Tort Claims Act, for damages arising out of U.S. support of the Nicaraguan Contras. The district court dismissed the action primarily on the basis of the political question doctrine. The Court of Appeals for the District of Columbia affirmed the dismissal, although it chose not to follow the lower court’s use of the political question doctrine.¹²⁷ Writing for the Court, then Judge Scalia acknowledged the relevance of the state actor requirement for purposes of actions brought under the Alien Tort Claims Act. Judge Scalia stated “[w]e are aware of no treaty that purports to make the activities at issue here unlawful when conducted by private individuals. As for the law of nations — so called ‘customary international law,’ arising from ‘the customs and usages of civilized nations,’ — we conclude that this also does not reach private, non-state conduct of this sort for the reasons stated by Judge Edwards in *Tel-Oren v. Libyan Arab Republic*.”¹²⁸ Thus, the Court of Appeals dismissed the claim brought pursuant to the Alien Tort Claims Act.

Having concluded that only state actors violate the law of nations, the district court then examined the legal status of the Bosnian Serbs and the Republika Srpska. It concluded that the Bosnian-Serbs did not constitute a recognized state.¹²⁹ “The current Bosnian-Serb warring military faction does not constitute a recognized state any more than did the PLO, as it existed at the time that the District of Columbia Circuit decided *Tel-Oren*, or than did the Nicaraguan Contras at the time Justice Scalia decided *Sanchez-Espinoza*.”¹³⁰ Indeed, the Bosnian-Serbs had not even reached the level of political organization or international recognition achieved by the PLO at the time of the *Tel-Oren* decision.¹³¹ Thus, the court concluded that Karadzic’s faction was not acting under the color of any recognized state law.¹³² The district court held that since the Bosnian Serbs were not acting under the color of any recognized state, the actions of Karadzic could not be remedied through the Alien Tort Claims Act. In addition, the court refused to extend the Alien Tort Claims Act to redress acts of torture committed by private individuals.¹³³

125. Doe, 866 F. Supp. at 740. See also, In Re Estate of Ferdinand E. Marcos Litigation, 978 F.2d 493 (9th Cir. 1992); Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).

126. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985).

127. *Id.* at 206.

128. *Id.* at 206-207.

129. The district court referred to *Klinghoffer v. S.N.C. Achille Lauro* which defined “states” as “entities that have a defined and a permanent population, that are under the control of their own government, and that engage in or have the capacity to engage in, formal relations with other such entities.” *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2nd Cir. 1991). It concluded that the Bosnian-Serb entity failed to meet this definition. Doe, 866 F. Supp. at 741.

130. *Id.*

131. As noted by the district court, the PLO was granted permanent observer status in the United Nations in 1974. *Id.* See also, *United States v. PLO*, 695 F. Supp. 1456, 1459 (S.D.N.Y. 1988).

132. Doe, 866 F. Supp. at 741.

133. *Id.*

B. Torture Victim Protection Act

The district court then examined whether jurisdiction could be based upon the Torture Victim Protection Act, which was designed to codify the private right of action against official torture as set forth in *Filartiga*.¹³⁴ The TVPA was enacted in 1992 and provides a cause of action for official torture and extra-judicial killing.¹³⁵ It provides, in pertinent part:

An individual who, under actual or apparent authority, or color of law, of any foreign nation —

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

After examining the language of the statute and its legislative history, the district court determined that the statute “only extends to actions carried out under the authority or color of law of an entity recognized by the United States as a foreign nation.”¹³⁶ Since Karadzic was not acting within the authority of any foreign nation, the statute did not provide jurisdiction.¹³⁷ “[F]inding that the acts attributed to defendant are those of private individuals . . . and finding that the TVPA clearly was enacted to redress acts of torture by governments or government officials, plaintiffs’ cause of action against defendant based on the TVPA cannot lie.”¹³⁸

C. Federal Question Statute

Finally, the district court examined whether it had jurisdiction under the federal question statute, which provides that “the district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.”¹³⁹ Since jurisdiction did not lie under either the Alien Tort Claims Act or the Torture Victim Protection Act, the court indicated that “the only other jurisdictional grounds for Plaintiffs to assert in this matter would be to base their claims on an implied right of action arising out of the law of nations.”¹⁴⁰ The court, however, declined to find an implied right of action

134. *Id.*

135. See generally, Yoav Gery, *The Torture Victim Protection Act*, 26 GW J. INT’L L. & ECON. 597 (1993); Christopher Haffke, *The Torture Victim Protection Act: More Symbol Than Substance*, 43 EMORY L. J. 1467 (1994).

136. Doe, 866 F. Supp. at 741. According to the House Report on the Torture Victim Protection Act, “the phrase ‘under actual or apparent authority, or color of law’ makes clear that the plaintiff must establish some governmental involvement in the torture or killing to prove a claim. . . . The bill does not attempt to deal with torture or killing by purely private groups.” House Report No. 367, 102nd Cong., 1st Sess. 5 (1991).

137. In addition, the district court noted that the statute requires the plaintiff to exhaust all available local remedies. It indicated, however, that it was unclear from the record whether the plaintiffs had sought a local remedy or whether such remedies were even available. Doe, 866 F. Supp. at 742.

138. *Id.*

139. 28 U.S.C. § 1331.

140. Doe, 866 F. Supp. at 743.

arising under the law of nations. It indicated that Congress had already addressed this matter in the Alien Tort Claims Act and the Torture Victim Protection Act.¹⁴¹ In addition, the district court indicated that "the law of nations provides no substantive right to be free from the private acts of individuals."¹⁴² The court held that "actions based only on § 1331 without an express right of action granted by Congress, must be dismissed for lack of subject-matter jurisdiction."¹⁴³

Since the district court found no bases for subject matter jurisdiction, it granted Karadzic's motion to dismiss.¹⁴⁴ The plaintiffs in both actions immediately appealed the district court's ruling to the Second Circuit Court of Appeals.¹⁴⁵ Several human rights organizations filed amicus briefs urging the Second Circuit to reverse the district court's ruling.¹⁴⁶ The U.S. government also submitted a statement of interest in the case urging reversal.¹⁴⁷ The cases were argued before the Second Circuit on June 20, 1995.¹⁴⁸ On October 13, 1995, the Second Circuit issued its ruling.

IV.

KADIC V. KARADZIC: THE COURT OF APPEALS' RULING

In *Kadic v. Karadzic*, the Second Circuit Court of Appeals reversed the district court's ruling and remanded the matters for further proceedings consistent with its opinion.¹⁴⁹ The Court examined three issues: (1) subject matter jurisdiction; (2) service of process and personal jurisdiction; and (3) justiciability.

141. *Id.*

142. *Id.*

143. *Id.*

144. The district court also dismissed the plaintiff's state claims for lack of subject matter jurisdiction. *Id.* at 744.

145. In their appeal, the plaintiffs argued that the district court erred in holding that it lacked subject matter jurisdiction. Specifically, they challenged the district court's ruling on three grounds. First, the court erred in concluding that acts committed by non-state actors do not violate the law of nations. Second, the court erred in failing to conclude that acts committed by non-state actors can violate U.S. treaty obligations. Third, the district court erred in concluding that the Serbian Republic of Bosnia-Herzegovina does not constitute a state and, therefore, that Radovan Karadzic was not acting under color of official authority.

146. Amicus briefs were filed by several organizations including the International Human Rights Law Group, Human Rights Watch as well as several international law professors.

147. Statement of Interest of the United States, *Doe v. Karadzic*, (2nd Cir. 1995) (No. 94-9069). The United States argued that Karadzic was not entitled to immunity either as an invitee of the United Nations or as a head of state. Similarly, the United States argued that the political question doctrine did not warrant dismissal of the complaint. Finally, the United States argued that the district court erred in concluding that acts committed by non-state actors do not violate the law of nations. In fact, "customary international law does not bind exclusively state actors. Depending on the violation alleged, acts committed by non-state actors may indeed violate international law." *Id.* at 5.

148. See Matthew Goldstein, *Jurisdiction of Federal Court Over Bosnian Leader Argued*, NY. LAW JOURNAL, June 21, 1995, at 1; *When Rape is Genocide*, CONN. L. TRIB., August 21, 1995, at 8.

149. *Kadic*, 70 F.3D at 236.

A. Subject Matter Jurisdiction

The Second Circuit's analysis of subject-matter jurisdiction addressed each of the statutory bases for jurisdiction asserted by the plaintiffs: (1) the Alien Tort Claims Act; (2) the Torture Victim Protection Act; and (3) the federal question statute.¹⁵⁰

1. Alien Tort Claims Act

In determining the application of the Alien Tort Claims Act, the Second Circuit examined three issues. First, it examined whether non-state actors can violate international law. Second, it examined whether the specific allegations made by the plaintiffs were violations of the law of nations when committed by non-state actors. Third, it examined whether the Bosnian-Serb entity headed by Karadzic constituted a state under international law and, alternatively, whether Karadzic was acting under the color of Yugoslav law.

a. International Law and Non-State Actors

Citing its earlier decision in *Filartiga v. Pena-Irala*, the Court identified three conditions that are required for the Alien Tort Claims Act to confer subject-matter jurisdiction: "(1) an alien sues (2) for a tort (3) committed in violation of the law of nations (i.e. international law)."¹⁵¹ Since the first two conditions were clearly satisfied, "the only disputed issue is whether plaintiffs have pleaded violations of international law."¹⁵²

As a preliminary matter, the Second Circuit noted that "[b]ecause the Alien Tort Act requires that plaintiffs plead a 'violation of the law of nations' at the jurisdictional threshold, this statute requires a more searching review of the merits to establish jurisdiction than is required under the more flexible 'arising under formula of section 1331."¹⁵³ The Court indicated that it was not enough to plead a colorable violation of the law of nations. Rather, the complaint must adequately plead a violation of the law of nations or a treaty of the United States.¹⁵⁴

The Second Circuit challenged the contention that "the law of nations, as understood in the modern era, confines its reach to state action."¹⁵⁵ It noted that piracy was traditionally viewed as a violation of international law even though it was committed by private individuals.¹⁵⁶ In addition, such actions as slave

150. *Id.*

151. *Id.* at 238.

152. *Id.*

153. *Id.*

154. *Id.* See also, *Filartiga*, 630 F.2d at 887-888.

155. *Kadic*, 70 F.3d at 239. The Court noted that the norms of contemporary international law may be identified by "consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law." *Id.* at 238 (quoting *Filartiga*, 630 F.2d at 880).

156. The Court cited the Supreme Court's ruling in *The Brig Malek Adhel*, where it observed that pirates were "*hostis humani generis*" because they acted "without . . . any pretense of public authority." *The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844).

trade and certain war crimes were also violations of international law even when committed by private individuals.¹⁵⁷ Indeed, the *Restatement (Third) of the Foreign Relations Law* provides that “[i]ndividuals may be held liable for offenses against international law, such as piracy, war crimes, and genocide.”¹⁵⁸ The Court also noted that the Executive Branch has long recognized the liability of private individuals for violations of international law and the availability of the Alien Tort Claims Act as a remedy in such matters. An early opinion by the Attorney General indicated the availability of the Alien Tort Claims Act to remedy violations by private individuals of international law.¹⁵⁹ The Court also referred to the Statement of Interest filed by the United States which indicated that it was the government’s position that private individuals may be sued under the Alien Tort Claims Act for certain violations of international humanitarian law.

In contrast to the district court’s interpretation of *Filartiga* and *Tel-Oren*, the Second Circuit ruled that these decisions do not support the contention that the actions of non-state actors do not violate the law of nations.¹⁶⁰ *Filartiga* involved allegations of torture committed by a public official. “We had no occasion to consider whether international law violations other than torture are actionable against private individuals, and nothing in *Filartiga* purports to preclude such a result.”¹⁶¹ Similarly, Judge Edwards’ concurring opinion in *Tel-Oren* was limited to the specific allegation of torture. He did not suggest a similar result for other human rights violations. Indeed, Judge Edwards acknowledged that there exists a “handful of crimes to which the law of nations attributes individual responsibility,” including piracy and slave-trading.¹⁶²

Finally, the Second Circuit stated that the scope of the Alien Tort Claims Act remains undiminished by the enactment of the Torture Victim Protection Act. According to the Court, the TVPA merely codifies the cause of action recognized by the *Filartiga* decision and extends its application to U.S. citizens.¹⁶³ Indeed, the Court also referred to the legislative history of the TVPA which recognized the limited nature of the TVPA and the expansive scope of the Alien Tort Claims Act.¹⁶⁴

157. See M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 193 (1992).

158. Restatement (Third) of the Foreign Relations Law of the United States, Part II, introductory note (1987).

159. See *Breach of Neutrality*, 1 *Op. Att’y Gen.* 57, 59 (1795).

160. *Kadic*, 70 F.3d at 240-241.

161. *Id.* at 240.

162. *Id.* (quoting, *Tel-Oren*, 726 F.2d at 795).

163. *Id.* at 241.

164. *Id.* According to a congressional report, “[c]laims based on torture and summary executions do not exhaust the list of actions that may appropriately be covered [by the Alien Tort Claims Act]. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.” H.R. Rep. No. 367, 102nd Cong., 2nd Sess., at 4 (1991).

Thus, the Second Circuit concluded that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”¹⁶⁵

b. Plaintiff's Specific Allegations

The Second Circuit then examined whether the specific allegations made by the plaintiffs were violations of the law of nations when committed by non-state actors. The Court recognized that “evolving standards of international law govern who is within the [Alien Tort Claims Act’s] jurisdictional grant.”¹⁶⁶ It placed these allegations into three categories: (a) genocide; (b) war crimes; and (c) torture and summary execution.

1. Genocide

The Court first examined the status of genocide in international law. On several occasions, the U.N. General Assembly has declared that genocide is a violation of international law regardless of whether committed by state or non-state actors.¹⁶⁷ Similarly, the Convention on the Prevention and Punishment of the Crime of Genocide provides that “persons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”¹⁶⁸ The Court also noted that the Genocide Convention Implementation Act of 1987 criminalizes the crime of genocide without regard to whether the offender is acting under color of law.¹⁶⁹ The Court concluded that the proscription against genocide under international law has applied equally to state and non-state actors.¹⁷⁰

The complaint against Karadzic alleged that he “personally planned and ordered a campaign of murder, rape, forced impregnation, and other forms of torture designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats.”¹⁷¹ Since this clearly states a violation of the international norm against genocide, the Court held that subject-matter jurisdiction existed over these claims.

2. War Crimes

The Court then examined the status of war crimes in international law.¹⁷² The Court noted that acts such as murder, rape, torture and arbitrary detention of

165. Kadic, 70 F.3d at 239.

166. *Id.* at 241. (quoting *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989)).

167. See G.A. Res. 95(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188 (1946); G.A. Res. 96(I), 1 U.N. GAOR, U.N. Doc. A/64/Add.1, at 188-189 (1946). See also, *In re Extradition of Demjanuk*, 612 F. Supp. . 544, 555 (N.D. Ohio).

168. Convention on the Prevention and Punishment of the Crime of Genocide, entered into force Jan. 12, 1951, 78 U.N.T.S. 277.

169. Genocide Convention Implementation Act of 1987, 18 U.S.C. Section 1091 (1988).

170. Kadic, 70 F.2d at 242.

171. *Id.*

172. The Court considered acts of murder, rape, torture and arbitrary detention of civilians to be war crimes. *Id.* at 242-243.

civilians “have long been recognized in international law as violations of the laws of war.”¹⁷³ Indeed, “[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II.”¹⁷⁴ Following World War II, these prohibitions were codified in the four Geneva Conventions.¹⁷⁵ Common Article 3, which appears in each of the Geneva Conventions, applies specifically to armed conflicts that are not of an international nature. It provides that “persons taking no active part in the hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction.”¹⁷⁶ The Court indicated that “under the law of war as codified in the Geneva Conventions, all ‘parties’ to a conflict — which includes insurgent military groups — are obliged to adhere to these most fundamental requirements of the law of war.”¹⁷⁷ Thus, the Court concluded that private individuals could be held liable for war crimes.

According to the Court, “[t]he offenses alleged by the appellants, if proved, would violate the most fundamental norms of the law of war embodied in Common Article 3, which binds parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents.”¹⁷⁸ Since these offenses are clearly war crimes, the Court held that subject-matter jurisdiction existed over these claims.

3. *Torture and Summary Execution*

The Court next examined whether non-state actors could be held accountable for torture and summary execution.¹⁷⁹ The Court recognized that official torture is prohibited by international law. Both the *Filartiga* opinion and the Torture Victim Protection Act attest to the universal prohibition against official torture. However, the Court could not identify an international prohibition against torture when committed by non-state actors. For example, the (Conven-

173. See *In re Yamashita*, 327 U.S. 1, 14 (1946).

174. *Kadic*, 70 F.3d at 243.

175. See generally, Theodore Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995); FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* (2nd ed. 1991).

176. Common Article 3 provides that with respect to individuals that are not taking part in the hostilities, the following acts are prohibited at any time and in any place whatsoever:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

177. *Kadic*, 70 F.3d at 243. The Court refused to consider whether the provisions of the 1977 Protocol Additional to the Geneva Conventions had ripened into universally accepted norms of international law. *Id.* Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts, *reprinted in* 16 I.L.M. 1442 (1977).

178. *Kadic*, 70 F.3d at 243.

179. In the earlier portions of the opinion, the Court also referred to crimes against humanity and other instances of inflicting death, torture and degrading treatment. It limited its analysis, however, to torture and summary execution.

tion Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment) defines torture as “inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” Similarly, the Torture Victim Protection Act only imposes liability for acts of torture committed by individuals acting “under actual or apparent authority, or color of law, of any foreign nation.” Thus, torture and summary execution are proscribed by international law only when committed by state officials. The Court noted, however, that torture and summary execution may be encompassed within the claims of genocide and war crimes.¹⁸⁰

c. *State Action and the Bosnian Serbs*

Finally, the Second Circuit examined the plaintiff’s contention that they were entitled to prove that the Bosnian Serb entity of Republika Srpska “satisfies the definition of a state for purposes of international law violations and, alternatively, that Karadzic acted in concert with the recognized state of the former Yugoslavia and its constituent republic, Serbia.”¹⁸¹

According to the Court, the definition of a state is well established in international law. The *Restatement (Third) of the Foreign Relation Law* provides that “[u]nder international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”¹⁸² As the Court recognized, formal recognition is not a condition of statehood. Indeed, international humanitarian law applies to states regardless of their status as recognized or unrecognized states. “It would be anomalous indeed if non-recognition by the United States, which typically reflects disfavor with a foreign regime — sometimes due to human rights abuses — had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international law norms that apply only to state actors.”¹⁸³ In addition, the Court suggested that the state actor requirement merely requires a semblance of official authority. “The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists.”¹⁸⁴

Alternatively, the Court recognized that the plaintiffs were entitled to prove that Karadzic was acting under color of law in cooperation with the former Yu-

180. The Court indicated that “at this threshold stage in the proceedings it cannot be known whether appellants will be able to prove the specific intent that is an element of genocide, or prove that each of the alleged torts were committed in the course of an armed conflict, as required to establish war crimes.” *Id.* at 244.

181. *Id.*

182. *Restatement (Third) of the Foreign Relations Law of the United States*, § 201. *See also*, *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d at 47; *National Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2nd Cir. 1988).

183. *Kadic*, 70 F.3d at 245.

184. *Id.*

goslavia.¹⁸⁵ The Court referred to the “color of law” jurisprudence of 42 U.S.C. § 1983 as a relevant guide to determine “whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act.”¹⁸⁶ Section 1983 recognizes that an individual acts under color of law when he acts in cooperation with state officials or with significant state aid.¹⁸⁷ Thus, the plaintiffs were entitled to prove that “Karadzic acted under color of law of Yugoslavia by acting in concert with Yugoslav officials or with significant Yugoslavian aid.”¹⁸⁸

2. Torture Victim Protection Act

The Second Circuit indicated that the Torture Victim Protection Act is not a jurisdictional statute. Rather, it provides a cause of action for official torture.¹⁸⁹ Thus, the TVPA permitted the plaintiffs “to pursue their claims of official torture under the jurisdiction conferred by the Alien Tort Act and also under the general federal question jurisdiction of § 1331.”¹⁹⁰

3. Federal Question Statute

Finally, the Second Circuit examined whether the general federal question statute provides “an independent basis for subject matter jurisdiction over all claims alleging violations of international law.”¹⁹¹ The plaintiffs argued that since federal common law incorporates the law of nations, “causes of action for violations of international law ‘arise under’ the laws of the United States for purposes of jurisdiction under § 1331.”¹⁹² The Court recognized the uncertainty surrounding federal question jurisdiction regarding violations of international law. In *Tel-Oren*, Judge Edwards indicated that § 1331 did not provide subject matter-jurisdiction for violations of international law unless the plaintiff could identify an express or implied remedy under the law of nations. However, some courts have upheld jurisdiction under § 1331 for violations of international law.¹⁹³ In *Filariga*, while the Second Circuit recognized the possibility of ju-

185. In their appellate brief, the plaintiffs referred to several domestic and international statements which recognized the relationship between the former Yugoslavia and the Bosnian Serbs. Brief of Plaintiff Appellants, *Kadic v. Karadzic*, (No. 94-9069), at 41-43. See, e.g., Notice of Continuation of Emergency with Respect to the Federal Republic of Yugoslavia, 58 Fed. Reg. 3093 (May 25, 1993); Report of the Commission on Human Rights, 2nd Special Sess., at 3, U.N. Doc. E/CN.4/1992/S-2/6 (1992).

186. *Kadic*, 70 F.3d at 245. See also, Suarez-Mason, 672 F. Supp. at 1546.

187. *Kadic*, 1995 U.S. App. LEXIS, at 28826, 34. See also, *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982); *Monroe v. Pape*, 365 U.S. 167, 172-180 (1960); *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 187-188 (1912).

188. *Kadic*, 70 F.3d at 245.

189. Indeed, the plaintiffs made this assertion in their appellate brief. “The TVPA is not a jurisdictional statute, but provides a substantive federal claim. Federal jurisdiction is accordingly based upon 28 U.S.C. Section 1331 for actions ‘arising under’ the laws of the United States.” Brief of Plaintiff Appellants, *Kadic*, *supra* note 185, at 10-11.

190. *Kadic*, 70 F.3d at 246. See also, *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995).

191. *Kadic*, *Kadic*, 70 F.3d at 246.

192. *Id.*

193. See, e.g., Suarez-Mason, 672 F. Supp. at 1544.

isdiction under § 1331, it rested jurisdiction solely on the Alien Tort Claims Act.

Since jurisdiction had already been found under the Alien Tort Claims Act, the Second Circuit refrained from ruling definitively “on whether any causes of action not specifically authorized by statute may be implied by international law standards as incorporated into United States law and grounded on § 1331 jurisdiction.”¹⁹⁴

B. *Service of Process and Personal Jurisdiction*

Karadzic argued that he was immune from service because of his status as an invitee of the United Nations. Specifically, he argued that the U.N. Headquarters Agreement and federal common law immunity rendered him immune from service.

The Headquarters Agreement Between the United Nations and the United States requires the United States to allow transit, entry and access for U.N. invitees to the Headquarters District.¹⁹⁵ The Agreement provides that service of process may take place within the Headquarters District only with the consent of the Secretary-General.¹⁹⁶ The Court determined, however, that Karadzic had not been served within the well-defined Headquarters District.¹⁹⁷ The Agreement also provides that designated U.N. representatives are to be accorded the same privileges and immunities as diplomatic personnel. Again, the Court determined that Karadzic was not a designated representative of a U.N. member.¹⁹⁸ Finally, the Agreement provides that federal, state and local officials may not impose any impediments to transit to or from the Headquarters District for U.N. invitees. The Court refused to extend the application of this provision to prohibit service of process to U.N. invitees “because it would effectively create an immunity from suit for United Nations invitees where none is provided.”¹⁹⁹

194. Kadic, 70 F.3d at 246.

195. Headquarters Agreement Between the United Nations and the United States, June 26, 1947, 61 Stat. 3416, T.I.A.S. No. 1676, 11 UNTS 11, *codified at* 22 U.S.C. Section 287 (1988).

196. The Headquarters District is bounded by Franklin D. Roosevelt Drive, 1st Avenue, 42nd Street, and 48th Street. Kadic, 70 F.3d at 247.

The U.N. Office of Legal Affairs has indicated that “[t]he Headquarters Agreement does not confer any diplomatic status upon an individual invitee because of his status as such. He therefore cannot be said to be immune from suit or legal process during his sojourn in the United States and outside of the Headquarters district It is . . . clear that the United Nations would be in no position to offer general assurances to [an individual invitee] concerning immunity from legal process during his sojourn in the United States.” Selected Legal Opinions of the Secretariat of the United Nations and Related Inter-Governmental Organizations 164-165 *quoted in* Plaintiffs’ Memorandum in Opposition To Defendant’s Motion to Dismiss Prior to Answer, Kadic, (No. 93-CIV-1163) (PKL), at 7.

197. Kadic, 70 F.3d at 247.

198. *Id.*

199. *Id.* See also, Klinghoffer v. SNC Achille Lauro, where the Court refused to extend the immunities of the Headquarters Agreement beyond those already provided in the text. Klinghoffer v. SNC Achille Lauro, 937 F.2d at 48.

In addition, Karadzic argued that federal common law immunity rendered him immune from service of process.²⁰⁰ He argued that such a rule is important because it protects the ability of the United Nations to function effectively and consult with invited guests.²⁰¹ He also argued that his limited presence in New York should preclude personal jurisdiction. The Court, however, declined to create such immunity, which clearly extended beyond the terms of the Headquarters Agreement reached between the United Nations and the United States.²⁰² Finally, the Court held that Karadzic's possible recognition as a head-of-state should not affect the present litigation.²⁰³ In essence, it would be entirely inappropriate for the judiciary to establish immunity upon mere speculation.

For these reasons, the Court held that if Karadzic had been served with process outside of the U.N. Headquarters District, he is subject to the personal jurisdiction of the district court.²⁰⁴

C. *Justiciability*

The Court recognized that "cases of this nature might pose special questions concerning the judiciary's proper role when adjudication might have implications in the conduct of this nation's foreign relations."²⁰⁵ It rejected, however, any attempt to invoke doctrines of justiciability in a categorical fashion. "[A] preferable approach is to weigh carefully the relevant considerations on a case-by-case basis."²⁰⁶ It then examined whether the political question doctrine or the act of state doctrine should bar justiciability of the action.²⁰⁷

200. Kadic, 70 F.3d at 247.

201. Karadzic analogized his proposed immunity to other rules which recognize immunity from service. He referred to the government contracts exception to the District of Columbia's long-arm statute which holds that "mere entry [into the District of Columbia] by non-residents for the purpose of contacting federal government agencies cannot serve as a basis for in personam jurisdiction." *Id.* (quoting *Rose v. Silver*, 394 A.2d 1368, 1370 (D.C. 1978)). He also referred to the restriction on personal jurisdiction in those cases where an individual enters a jurisdiction for purposes of litigation or to attend court. Kadic, 70 F.3d at 248 (citing 4 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, SECTION 1076 (2nd ed. 1987)). Finally, Karadzic referred to the *Klinghoffer* decision where the Court limited the construction of New York's long-arm statute as it applied to U.N. activities. Kadic, 70 F.3d at 248 (citing *Klinghoffer*, 937 F.2d at 51).

202. *Id.*

203. *Id.*

204. During the litigation, the Department of State had indicated to attorneys for the plaintiffs that Karadzic was not immune from suit as an invitee of the United Nations. The letter, written by Michael Habib, Director of the Office of Eastern European Affairs at the Department of State provided that "Mr. Karadzic's status during his recent visits to the United States has been solely as an 'invitee' of the United Nations, and as such he enjoys no immunity from the jurisdiction of the courts of the United States. As a general legal principle, the United States does not accord immunities to individuals on a discretionary basis, but rather does so only as provided by a federal statute, a treaty, or customary international law." Letter from Michael Habib, Director, Office of Eastern European Affairs, Department of State, to Beth Stephens, Center for Constitutional Rights (March 24, 1993).

205. Kadic, 70 F.3d at 248.

206. *Id.* at 249.

207. In addition, the Court briefly addressed the doctrine of *forum non conveniens*. In its Statement of Interest, the U.S. government had indicated that the *forum non conveniens* doctrine should

1. Political Question Doctrine

The Court indicated that “[a]lthough these cases present issues that arise in a politically charged context, that does not transform them into cases involving nonjusticiable political questions.”²⁰⁸ The Court then reviewed the political question factors identified by the Supreme Court in *Baker v. Carr*.²⁰⁹ It recognized that the Judicial Branch is the appropriate branch of government to examine these claims. It also recognized that international law provides judicially discoverable and manageable standards for adjudicating claims brought under the ATCA. The Court noted that its decision would not interfere with important government interests since the U.S. government had indicated that it was not opposed to the lawsuit. Finally, it recognized that while disputes involving foreign policy have the potential to raise political question issues, “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.”²¹⁰ Thus, the Court concluded that the *Karadzic* litigation did not present a nonjusticiable political question.

2. Act of State Doctrine

The Court also examined whether the act of state doctrine barred adjudication.²¹¹ It recognized that the act of state doctrine might be applicable to some cases brought under the Alien Tort Claims Act. However, the Court doubted “that the acts of even a state official, taken in violation of a nation’s fundamental law and wholly unratified by that nation’s government, could properly be char-

be considered “in cases such as these where the parties and the conduct alleged in the complaints have as little contact with the United States as they have here.” Statement of Interest of the United States, *Doe v. Karadzic*, at 18. However, the U.S. government took no position on whether dismissal on this basis would be appropriate. The Court indicated that no party had identified a more suitable forum for the present action. *Kadic*, 70 F.3d at 250. It was evident that the courts in the former Yugoslavia were unable to entertain the present matter “even if circumstances concerning the location of witnesses and documents were presented that were sufficient to overcome the plaintiff’s preference for a United States forum.” *Id.*

208. *Id.* at 249.

209. *Baker v. Carr*, 369 U.S. 186 (1962). According to the Supreme Court, a nonjusticiable political question may involve any of the following issues:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

210. *Kadic*, 70 F.3d at 250 (*quoting* *Japan Whaling Ass’n v. American Cetacean Society*, 478 U.S. 221, 229-30 (1986)).

211. Under the act of state doctrine, courts refrain from judging the acts of a foreign state within its territory. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). The Court of Appeals examined this issue despite the fact that the issue was not asserted in the district court and was not before the Court on this appeal. *See generally*, Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

acterized as an act of state.”²¹² In addition, the Court noted that the act of state doctrine had been previously applied in those cases which lacked unambiguous agreements regarding controlling legal principles.²¹³ In the present case, however, there is universal agreement regarding the legal principles underlying international human rights.

For these reasons, the Court of Appeals reversed the judgment of the district court, and remanded both cases for further proceedings in accordance with its opinion.²¹⁴

V.

THE IMPLICATIONS OF THE KARADZIC LITIGATION

The *Karadzic* litigation is significant because it addresses several important issues concerning international law and the application of international legal principles in the United States.

A. International Law and Non-State Actors

Perhaps the most significant element of the Second Circuit’s opinion is its holding that non-state actors may be held liable for certain violations of international law.

This decision is certainly consistent with international law. “Since the latter half of the nineteenth century it has been generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals and for which punishment may be imposed, either by properly empowered international tribunals or by national courts and military tribunals.”²¹⁵ For example, piracy has long been recognized to be a violation of international law when committed by private individuals.²¹⁶ Similarly, the Nuremberg trials indicated that private individuals could be held responsible for violations of international humanitarian law.²¹⁷ Countless international agreements now recog-

212. Kadic, 70 F.3d at 250.

213. *Id.* at 250.

214. Karadzic filed a petition for rehearing on October 27, 1995. Thomas Scheffey, *Bosnian Serb Leader on Trial*, LEGAL TIMES, Nov. 13, 1995, at 2. The Second Circuit denied Karadzic’s request to review the decision *en banc*. Kadic v. Karadzic 74 F.3d 377 (1996). Karadzic then filed a petition for certiorari with the Supreme Court on April 4, 1996. The petition was denied on June 17, 1996. Linda Greenhouse, Supreme Court Roundup, N.Y. TIMES, June 18, 1996, at A20.

215. Brownlie, *supra*, note 2 at 561.

216. Pirates are considered *hostis humani generis* (common enemies of mankind). According to the eighteenth century jurist Richard Woodeson, “piracy, according to the law of nations, is incurred by depredations on or near the sea, without authority from any prince or state.” ALFRED RUBIN, THE LAW OF PIRACY 111 (1988) quoting Woodeson. More recently, Article 101 of the United Nations Convention on the Law of the Sea defines piracy as “any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or private aircraft.” U.N. Doc. A/CONF.62/122 (1982). Indeed, both Judge Bork and Judge Edwards, in *Tel-Oren v. Libyan Arab Republic*, noted the non-state element of piracy. Judge Edwards cited Oppenheim for the proposition that the act of piracy makes the pirate lose the protection of his home state. *Tel-Oren*, 726 F.2d at 781. Similarly, Judge Bork acknowledged that piracy “could not be committed by nations.” *Id.* at 813.

217. During the Nuremberg trials, one military tribunal noted that:

nize both the rights and obligations of private individuals under international law.²¹⁸ To suggest that private individuals do not violate international law, therefore, is entirely at odds with the development of international law during this century.

The decision is also consistent with domestic law and practice. As early as 1795, the Executive Branch recognized the liability of private individuals for certain violations of international law.²¹⁹ The Statement of Interest filed by the U.S. government in *Kadic* affirms the position of the Executive Branch on this issue.²²⁰ Similarly, the opinions of the federal courts recognize the liability of private individuals for violations of international law.²²¹ Neither *Filaritiga* nor *Tel-Oren* support the contention that the actions of private individuals do not violate the law of nations. The facts of *Filaritiga* were limited to acts of official torture and the Court of Appeals did not address the acts of private individuals. In *Tel-Oren*, however, Judge Edwards acknowledged that there exists a "handful of crimes to which the law of nations attributes individual responsibility," including piracy and slave-trading.²²² And Judge Scalia noted in *Sanchez-Espinoza* that the Alien Tort Claims Act "may conceivably have been meant to cover only private, nongovernmental acts that are contrary to treaty or the law of na-

[i]nternational law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with the personal wrong, and punishment falls on the offender *in propria persona*. The application of international law to individuals is no novelty.

In Re Flick, U.S. Military Trib., Nuremberg, 14 INT'L L. REP. 266 (1947).

218. See, e.g., American Convention on Human Rights, Nov. 22, 1969, *reprinted in* 61 I.L.M. 673 (1970); African Charter on Human and People's Rights, June 27, 1981, *reprinted in* 21 I.L.M. 58 (1982); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 5, 1950, 213 U.N.T.S. 221. In addition to these human rights treaties, international law imposes obligations on individuals in several other contexts. See, e.g., International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 146 (1979), *reprinted in* 18 I.L.M. 1456 (1979); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192 *reprinted in* 10 I.L.M. 133 (1971). See also, Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992); LYAL SUNGA, *INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS ABUSES* (1992).

219. See 1 Op. Att'y Gen. 57, 58 (1795); 26 Op. Att'y Gen. 250 (1907). As indicated by Judge Edwards in *Tel-Oren*, the opinions of the Attorney General are entitled to some deference by the courts. *Tel-Oren*, 726 F.2d at 780; *Oloteo v. INS*, 643 F.2d 679, 683 (9th Cir. 1981).

220. "Customary international law does not bind exclusively state actors. Depending upon the violation alleged, acts committed by non-state actors may indeed violate international law." Statement of Interest of the United States, Doe, *supra*, note 147 at 5.

221. In *Ex Part Quirin*, the Supreme Court indicated that "[f]rom the very beginning of its history this Court has recognized and applied the laws of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *Ex Part Quirin*, 317 U.S. 1, 27-28 (1942). See also, *Henfield's Case*, 11 F.Cas. 1099, 1107 (C.C.D. Pa. 1793) (No. 6,360) ("When men have formed themselves into a political society, . . . they cannot, by this union, discharge themselves from any duties which they previously owed to those who form a part of the political association. . . . On states as well as individuals the duties of humanity are strictly incumbent.").

222. *Tel-Oren*, 726 F.2d at 795.

tions—the most prominent examples being piracy and assaults upon ambassadors.”²²³

It is important to recognize, however, a significant limitation on the Court’s decision. While it held that non-state actors can violate international law, it conditioned its ruling by noting that only certain forms of conduct violate the law of nations when perpetrated by private individuals. While the Court determined that private individuals could be held accountable for genocide and war crimes, it concluded that torture and summary execution are “proscribed by international law only when committed by state officials or under color of law.”²²⁴

Another important element of the Second Circuit’s ruling in *Kadic* is the expansion of the definition of state actor for those violations of international law which require state conduct. The Court refused to limit the definition of state actor to *de jure* states—that is, states formally recognized by the United States.²²⁵ Rather, the Court held that *de facto* states are also liable for violations of international law.²²⁶ This expansion of the definition of state actor is entirely consistent with the realities of contemporary international affairs.²²⁷ Entities may possess the formal attributes of statehood including territory, population and a formal government, and yet the United States may refuse to recognize their existence for political reasons. As the *Kadic* court indicated, “[i]t would be anomalous indeed if nonrecognition by the United States, which typically reflects disfavor with a foreign regime—sometimes due to human rights abuses—had the perverse effect of shielding officials of the unrecognized regime from liability for those violations of international norms that apply only to state actors.”²²⁸ Thus, international obligations should apply with equal rigor to *de facto* states. The Second Circuit recognized that the state action concept merely

223. Sanchez-Espinoza, 770 F.2d at 206.

224. *Kadic*, 70 F.3d at 243.

225. According to the *Restatement (Third) of the Foreign Relations Law*, a state “is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” *Restatement (Third) of the Foreign Relations Law*, § 201. This definition does not require formal recognition by other states as a condition for statehood.

226. The courts have generally recognized the existence of *de facto* states even in the absence of formal recognition by the U.S. government. Following the American Civil War, the federal courts recognized the *de facto* existence of the Confederate states for acts committed during the war. See *Ford v. Surget*, 97 U.S. 594 (1878); *United States v. Insurance Companies*, 89 U.S. (22 Wall.) 99 (1874); *Thorington v. Smith*, 75 (8 Wall.) 1 (1868). See also, *Banque de France v. Equitable Trust Co. of New York* 33 F.2d 202, 206 (S.D.N.Y. 1929) (“[T]he refusal of the political department to recognize a government should not be allowed to affect private rights which may depend upon proving the existing conditions in such a state.”); *Wulfson v. Russian Socialist Federated Soviet Republic*, 234 N.Y. 372, 375 (1923) (“Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force is a fact, not a theory.”).

227. While states remain the principal actors at the international level, numerous non-state actors also exist. These non-state actors include international organizations such as the United Nations and the European Union and nongovernmental organizations such as the International Red Cross and the World Bank. Janis, *supra*, note 1 at 187-191. See also, PHILLIP TAYLOR, *NONSTATE ACTORS IN INTERNATIONAL POLITICS* (1984).

228. *Kadic*, 70 F.3d at 245.

requires the semblance of official authority. "The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists."²²⁹

B. Alien Tort Claims Act

As the Second Circuit recognized in its opinion, "[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan."²³⁰ The Second Circuit's decision affirms the unique status of the Alien Tort Claims Act in protecting international human rights in U.S. courts.²³¹ Its decision also expands the scope of the ATCA. As indicated, the Court held that the Alien Tort Claims Act may apply to the actions of private individuals for certain violations of international law.²³² In those cases where violations of international law require state action, the Court indicated that the state action requirement should be read broadly to include *de facto* states, and that the state action requirement only requires the semblance of official authority. In addition, this requirement may be met when a private individual acts together with state officials or with significant state aid.²³³ Finally, the Court held that prudential doctrines such as the political question doctrine and the act

229. *Id.*

230. *Id.* at 236.

231. The transitory nature of the ATCA's jurisdiction is significant although not unique. According to the Second Circuit in *Filartiga*:

Common law courts of general jurisdiction regularly adjudicate transitory tort claims between individuals over whom they exercise personal jurisdiction, wherever the tort occurred. . . . It is not extraordinary for a court to adjudicate a tort claim arising outside its territorial jurisdiction. A state or nation has a legitimate interest in the orderly resolution of disputes among those within its borders, and where the *lex loci delicti commissi* is applied, it is an expression of comity to give effect to the laws of the state where the wrong occurred.

Filartiga, 630 F.2d at 885. See also, *Burnham v. Superior Court*, 495 U.S. 604 (1990).

232. In its only decision examining the Alien Tort Claims Act, the Supreme Court indicated that "the Alien Tort Statute by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerasia Hess*, 488 U.S. 428, 436 (1989). Indeed, Justice Rehnquist acknowledged that the ATCA applies to defendants "other than foreign states." *Id.*

In addition, several federal decisions explicitly recognize the application of the Alien Tort Claims Act to the acts of private individuals. See *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961); *Bolchos v. Darrell*, 3 F. Cas. 810 (D.C.S.C. 1795). See also, *Nguyen Da Yen v. Kissinger*, 528 F.2d 1194, 1201 (9th Cir. 1975).

233. Agency law supports this expansive view. According to the *Restatement (Second) of Agency*, "apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." *Restatement (Second) of Agency*, § 27 (1958). Indeed, the House Report on the Torture Victim Protection Act indicated that the judiciary should look to agency law when seeking to determine whether an individual has acted under actual or apparent authority. House Report No. 367, 102nd Cong., 1st Sess. 6 (1991).

of state doctrine should not preclude adjudication under the Alien Tort Claims Act merely because a case arises in a politically charged context.²³⁴

C. Federal Question Jurisdiction

The Second Circuit did not resolve the issue of whether the federal question statute provides subject-matter jurisdiction regarding claims arising under the law of nations. A careful analysis of this issue, however, suggests jurisdiction should be available under the federal question statute.

International law plays an integral role in the United States legal system. As early as 1796, the Supreme Court noted in *Ware v. Hylton*²³⁵ that “[w]hen the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement.”²³⁶ In *Murray v. Schooner Charming Betsy*,²³⁷ Chief Justice John Marshall noted that customary international law is a part of federal law.²³⁸ Indeed, Justice Marshall noted that “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains”²³⁹

Perhaps the most recognized statement on the role of customary international law in the United States was made by the Supreme Court in the seminal case of *The Paquete Habana*.²⁴⁰ In *The Paquete Habana*, two Spanish fishing vessels were captured by U.S. warships off the coast of Cuba during the Spanish-American War. The vessels were impounded and subsequently sold as war prizes in the United States. The owners of the vessels brought suit, seeking the proceeds from the sales. The Supreme Court examined “whether, upon the facts appearing in these records, the fishing smacks were subject to capture by the armed vessels of the United States during the recent war with Spain.”²⁴¹ As a preliminary matter, the Court noted that “[b]y an ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law, coast fishing vessels, pursuing their vocation of catching and bringing in fresh fish, have been recognized as exempt, with their cargoes and crews, from capture as prize of war.”²⁴² The Court then noted that such principles of

234. U.S. courts have generally rejected the extension of the act of state doctrine to protect individuals in human rights cases. For example, in *Paul v. Avril*, the district court determined that torture by a Haitian general did not constitute an act of state. *Paul v. Avril*, 812 F. Supp. 207, 212 (S.D. Fla. 1993). In *Jimenez v. Aristeguieta*, the Court of Appeals for the Fifth Circuit refused to apply the act of state doctrine to “crimes committed by the Chief of State done in violation of his position and not in pursuance of it.” *Jimenez v. Aristeguieta*, 311 F.2d 547, 558 (5th Cir. 1962). The Court noted that such crimes “are as far from being an act of state as rape.” *Id.*

235. 3 U.S. (3 Dall.) 199 (1796).

236. *Id.*

237. 6 U.S. (2 Cranch) 64 (1804).

238. *Id.* at 118. See also, Opinion of Attorney General Edmund Randolph (June 26, 1792), in 1 OP. ATT’Y GEN. 26, 27 (“The law of nations, although not specially adopted by the constitution or any municipal act, is essentially a part of the law of the land. Its obligation commences and runs with the existence of a nation, subject to modifications on some points of indifference.”)

239. *Murray*, 6 U.S. (2 Cranch) at 118.

240. 175 U.S. 677 (1900).

241. *Id.* at 686.

242. *Id.*

international law are binding in U.S. courts. In an oft-quoted passage, the Court stated, “[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.”²⁴³ Since international law prohibited the capture of fishing vessels as prizes of war, the Court held that the capture was unlawful.²⁴⁴ It ordered the proceeds of the sale of the vessels and their cargo to be restored to the owner.

Since the Supreme Court’s ruling in *The Paquete Habana*, it is well-settled that customary international law plays an integral role part of our jurisprudence.²⁴⁵ Indeed, customary international law has been characterized as federal common law.²⁴⁶ According to Louis Henkin, “[i]t is like federal common law in that both have the status of federal law for purposes of supremacy to state law. And it is like federal common law in that determinations of customary international law by the Supreme Court are law in the United States and binding on the states.”²⁴⁷ Similarly, the *Restatement (Third) of the Foreign Relations Law* recognizes that international law is part of the “law of the United States and supreme over the law of the several States.”²⁴⁸ As the Second Circuit commented in *Filartiga*, “[t]he law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution.”²⁴⁹ Indeed, the Second Circuit acknowledged in both *Filartiga* and *Karadzic* that a violation of the law of nations might also sustain jurisdiction under the federal question statute.²⁵⁰ In both cases, however, the Second Circuit deferred from addressing the issue since an alternative and directly relevant jurisdictional grant already existed.

It is evident that international law is an integral component of the laws of the United States. Under the explicit language of the federal question statute, therefore, jurisdiction should be recognized for claims arising under the law of nations.

243. *Id.* at 700.

244. *Id.* at 714.

245. *See, e.g.,* *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986).

246. Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555 (1984). *See also*, Note, *Judicial Enforcement of International Law Against the Federal and State Governments*, 104 HARV. L. REV. 1269 (1991).

247. Henkin, *supra* note 246, at 1561.

248. *Restatement (Third) of the Foreign Relations Law of the United States*, § 111(1).

249. *Filartiga*, 630 F.2d at 886. The Second Circuit added that “[i]t is an ancient and salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case.” *Id.*

250. *But see, Tel-Oren*, 726 F.2d at 778-780. In *Tel-Oren*, Judge Edwards argued that § 1331 did not provide jurisdiction for a violation of the law of nations unless the plaintiffs could identify a remedy granted by the law of nations or argue that such a remedy is implied.

VI. CONCLUSION

The violations of international humanitarian law perpetrated during the Yugoslav conflict have resulted in responses at both the international and domestic levels. At the international level, the United Nations has established an international tribunal for the prosecution of persons responsible for serious international human rights abuses committed in the territory of the former Yugoslavia. Several individuals, including Bosnian Serb military and political leaders, have been indicted by the War Crimes Tribunal. At the domestic level, Bosnian refugees have sought compensatory and punitive damages against Radovan Karadzic for human rights violations committed by forces under his command in Bosnia-Herzegovina. The Second Circuit's ruling in *Kadic v. Karadzic* indicates that individuals, regardless of their official status, may be held liable for certain violations of international law.

It is a well-known aphorism that there is no right without a remedy.²⁵¹ Statutes such as the Alien Tort Claims Act and the Torture Victim Protection Act provide victims of human rights abuses an opportunity to seek redress for violations of international humanitarian law. These statutes affirm the law of nations in U.S. courts and the commitment of the United States to protect human rights.

Although some have argued that the judiciary is the least dangerous branch of government, it has increasingly become a powerful instrument for the protection of human rights.²⁵² Thus, while many editorials comment about the role of the United States as the world's policeman, perhaps a more appropriate metaphor is to view the United States as the world's courtroom.²⁵³

251. According to Justice Holmes, "legal obligations that exist but cannot be enforced are ghosts that are seen in the law but that are elusive to the grasp." *The Western Maid*, 257 U.S. 419, 433 (1922). See also, Carlos Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992); W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 875 (1990).

252. THE FEDERALIST No. 78, at 464-466 (Alexander Hamilton) (Clinton Rossiter ed., 1961); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

253. See, e.g., Fernando Teson, *The International Ethics of a New Era: The Problem of the Kind World Policeman*, 16 MICH. J. INT'L L. 681 (1995); Henry Kissinger, *How To Live With a Hobbesian Choice*, L.A. TIMES, June 11, 1995, at M2. During oral argument before the Second Circuit in *Kadic*, Ramsey Clark, the attorney for Karadzic, commented that the United States "cannot be the policeman for the world and we cannot be the tort claims litigants for the world." Goldstein, *supra*, note 148 at 1.